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REPORT OF THE HUMAN RIGHTS COMMITTEE*

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Annex XII

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 237/1987, Denroy Gordon v. Jamaica (views adopted on 5 November 1992, forty-sixth session)

Submitted by: Denroy Gordon (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of communication: 29 May 1987

Date of decision on admissibility: 24 July 1989

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 5 November 1992,

Having concluded its consideration of communication No. 237/1987, submitted to the Human Rights Committee by Mr. Denroy Gordon under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication, dated 29 May 1987, is Denroy Gordon, a Jamaican citizen, born in 1961, formerly a police officer. At the time of submission the author was awaiting execution of a death sentence. Following the commutation of sentence in 1991, the author has been serving a sentence of life imprisonment at Gun Court Rehabilitation Centre, Jamaica. He claims to be the victim of a violation by Jamaica of article 14, paragraphs 1 and 3 (b), (d) and (e) of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 The author was arrested on 3 October 1981 on suspicion of having murdered, on the same day, Ernest Millwood. In January 1983, he was put on trial before the Manchester Circuit Court. As the jury failed to arrive at a unanimous verdict - 11 jurors were in favour of acquittal, only one supported a "guilty" verdict - the presiding judge ordered a retrial. In May 1983, at the conclusion of the retrial before the same court, the author was convicted of murder and sentenced to death. The Court of Appeal of Jamaica dismissed his appeal on 22 November 1985 and issued a written judgment in the case on 16 January 1986. A petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 25 January 1988. On 19 February 1991, the Governor-General of Jamaica commuted the author's death sentence to life imprisonment.

2.2 The prosecution's case was that for some time there had been friction between the author and the wife of the deceased, who was employed as a cleaner at Kendal Police Station in the Manchester District to which the author was attached as a young police constable. On the day of the crime, he was on duty and therefore armed with his service revolver. He went up to Mr. Millwood who was cutting grass with a machete, nearby the police station. An argument developed between them, following which the author set out to arrest Mr. Millwood for using indecent language. The latter ran away and the author followed him trying to effect the arrest. In the course of the chase the author shot in the air, but Mr. Millwood did not stop. Subsequently the author caught up with Mr. Millwood, who allegedly chopped at him with the machete. The author, in what he claims was lawful self-defence, fired a shot aimed at the left shoulder of the man, so as to disarm him. The shot, however, proved to be fatal. Immediately thereafter Corporal Afflick arrived on the scene. The author gave him his service revolver and Mr. Millwood's machete, explaining that he had pursued Mr. Millwood and warned him to drop the machete and that he shot Mr. Millwood when he resisted. The author returned to the police station and was formally arrested several hours later, after a preliminary investigation had been conducted.

Complaint

3.1 The author claims to be innocent and maintains that he was denied a fair trial by an independent and impartial tribunal, in violation of article 14, paragraph 1, of the Covenant. Firstly, he alleges that the members of the jury at the retrial were biased against him. He indicates that most of them were chosen from areas close to the community where the crime had occurred and surmises that, for that reason, they had already formed their opinion in the case, in particular on hearsay, before the start of the trial. Moreover, the jurors were allegedly sympathetic to the deceased and his relatives and, as a result, did not base their verdict on the facts of the case. In this connection, the author claims that, in spite of numerous requests for a change of venue on the ground that the jurors had displayed bias against the author, the Court refused to change the venue.

3.2 Furthermore, it is claimed that the judge abused his discretion in ruling inadmissible the author's statement to Corporal Afflick immediately after the shooting. The author contends that the statement was admissible as part of the res gestae and that it confirmed that his trial defence was not a later concoction.

3.3 As to the issue of self-defence the author submits that the judge should have directed the jury that the prosecution had to prove that the violence used was unlawful and that if the accused honestly believed that the circumstances warranted the use of force, he should be acquitted of murder, since the intent to act unlawfully would be negated by his belief, however mistaken or unreasonable. This the trial judge did not do.

3.4 The author further claims that the trial judge misdirected the jury by withdrawing from it the issue of manslaughter. According to the author, although the case was based on self-defence, the jury, if properly directed, could have arrived at a verdict of manslaughter on the basis of the evidence of some of the Crown's witnesses. The judge, however, in his summation, instructed the jury as follows: "I tell you this as a matter of law that provocation does not apply in this case. I tell you this as a matter of law again that manslaughter does not arise in this case ... It is my responsibility to decide

what verdicts I leave to you, and I take the responsibility of telling you that there are only two verdicts open to you on the evidence: 1. guilty of murder; 2. not guilty of murder, ...". According to Jamaican law a murder conviction carries a mandatory death sentence.

3.5 In the author's opinion article 14, paragraph 3 (b), of the Covenant was also violated in his case. While acknowledging that he was assisted by a lawyer in the preparation of his defence and during the trial, he alleges that he was not given sufficient time to consult with his lawyer prior to and during the trial. In this context, the lawyer is further said to have failed to employ the requisite emphasis in requesting a change of venue.

3.6 The author further alleges a violation of article 14, paragraph 3 (d), of the Covenant, since he was not present during the hearing of his appeal before the Jamaican Court of Appeal. In this connection, he claims that the issue of self-defence on which the case was factually based, was not adequately dealt with. Moreover, the Court of Appeal allegedly erred in not admitting into evidence a statement made by police Corporal Afflick.

3.7 Finally, the author submits that he has been a victim of a violation of article 14, paragraph 3 (e), of the Covenant in that no witnesses allegedly testified on his behalf, although, he claims, one would have been readily available. He indicates that the witnesses against him were cross-examined and that his lawyer sought, on several occasions, to test the credibility of the Crown's witnesses; in particular, since his trial was actually a retrial, the lawyer sought to point out contradictions in what the witnesses had testified during the preliminary inquiry, during the first trial and the retrial. The trial judge, however, allegedly intervened and instructed the lawyer to confine his questions to the retrial only.

3.8 In respect of the requirement of exhaustion of domestic remedies, the author argues that he should be deemed to have complied with this requirement, since his petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 25 January 1988. Moreover, he submits that, taking into account the length of time between the hearings in his case and the span of time actually spent on death row, the application of domestic remedies has been "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

3.9 The author is aware of the possibility of filing a constitutional motion under Sections 20 and 25 of the Jamaican Constitution, but contends that such a motion is not an effective remedy available to him, within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. He argues that because of his lack of financial means to retain counsel and the unavailability of legal aid for purposes of filing a constitutional motion before the Supreme (Constitutional) Court of Jamaica, he is effectively barred from exercising his constitutional rights.

State party's observations

4.1 The State party contends that the fact that the author's petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed does not necessarily imply that all available domestic remedies have been exhausted. It argues that the communication remains inadmissible because of the author's failure to seek redress under Sections 20 and 25 of the Jamaican Constitution for the alleged violation of his right to a fair trial.

4.2 In addressing the author's contention that the application of domestic remedies has been "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, the State party submits that the delays encountered are partly attributable to the author himself.

4.3 With respect to the substance of the author's allegation that he did not receive a fair trial, the State party submits that the facts as presented by the author seek to raise issues of facts and evidence, which the Committee does not have the competence to evaluate. The State party refers to the Committee's decision in communication No. 369/1989, in which it had been held that "while article 14 of the Covenant guarantees the right to a fair trial, it is for the appellate courts of the States parties to the Covenant to evaluate facts and evidence in a particular case". a/

Decision on admissibility and review thereof

5.1 On the basis of the information before it, the Human Rights Committee concluded that the conditions for declaring the communication admissible had been met, including the requirement of exhaustion of domestic remedies. Accordingly, on 24 July 1989, the Human Rights Committee declared the communication admissible.

5.2 The Committee has noted the State party's submissions of 10 January and 4 September 1990, made after the decision on admissibility, in which it reaffirms its position that the communication is inadmissible on the ground of non-exhaustion of domestic remedies.

5.3 On 24 July 1991, the Committee adopted an interlocutory decision requesting the State party to furnish detailed information on the availability of legal aid or free legal representation for the purpose of constitutional motions, as well as examples of such cases in which legal aid may have been granted or free legal representation may have been procured by the applicant. The State party was further requested to submit to the Committee written explanations or statements relating to the substance of the author's allegations.

5.4 On 14 January 1992, the State party reiterates its position that the communication is inadmissible for non-exhaustion of domestic remedies and requests the Committee to revise its decision on admissibility. It submits that there is no provision for legal aid or free legal representation in constitutional motions. With regard to the Committee's decision that the communication is admissible in so far as it may raise issues under article 14 of the Covenant, the State party demurs that article 14 has seven paragraphs and that it is not clear to what particular paragraph the finding of admissibility relates. "The Committee should indicate the specific provisions of article 14 or indeed of any of the articles to which its findings of admissibility relate, and in relation to which, therefore, Government is being asked to reply; additionally, the Committee must indicate the allegation made by the applicant which has given rise to the finding of admissibility in relation to a particular paragraph of article 14 or any other article. Failure by the Committee to provide this indication will leave the Government in the dark as to the precise allegation and breach to which it must respond in commenting on the merits. For it could not be the case that the Committee expects a reply on each and every allegation made by the applicant, since some of these are patently unmeritorious."

5.5 With regard to the State party's objection that the Committee's decision on admissibility was too broad, the Committee notes that the author's allegations were sufficiently precise and substantiated so as to allow the State party to address them. As to the merits of the author's allegations, it is for the Committee to consider them after declaring the communication admissible, in light of all the information provided by both parties.

5.6 With regard to the State party's arguments on admissibility, especially in respect of the availability of constitutional remedies which the author may still pursue, the Committee recalls that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed.

5.7 However, the Committee notes that by submission of 14 January 1992, the State party indicated that legal aid is not provided for constitutional motions; it also recalls that the State party has argued, by submission of 10 October 1991 concerning another case b/ that it has no obligation under the Covenant to make legal aid available in respect of such motions, as they do not involve the determination of a criminal charge, as required under article 14, paragraph 3 (d), of the Covenant. In the view of the Committee, this supports the finding, made in the decision on admissibility, that a constitutional motion is not an available remedy for an author who has no means of his own to pursue it. In this context, the Committee observes that the author does not claim that he is absolved from pursuing constitutional remedies because of his indigence; rather it is the State party's unwillingness or inability to provide legal aid for the purpose that renders the remedy one that need not be pursued for purposes of the Optional Protocol.

5.8 The Committee further notes that the author was arrested in 1981, tried and convicted in 1983, and that his appeal was dismissed in 1985. The Committee deems that for purposes of article 5, paragraph 2 (b), of the Optional Protocol, the pursuit of constitutional remedies would, in the circumstances of the case, entail an unreasonable prolongation of the application of domestic remedies. Accordingly, there is no reason to revise the decision on admissibility of 24 July 1989.

Examination of the merits

6.1 In so far as the author's claims under article 14 are concerned, the Committee notes that the State party has not addressed these allegations. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate in good faith all the allegations of violations of the Covenant made against it and its judicial authorities, and to make available to the Committee all the information at its disposal. The summary dismissal of the author's allegations, in general terms, does not meet the requirements of article 4, paragraph 2. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.2 In respect of the author's claim of a violation of article 14, paragraph 3 (b) and (d), the Committee notes that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. The determination of what constitutes "adequate time" depends on an assessment of the particular circumstances of each case. On the basis of the material before it, however, the Committee cannot conclude that

the author's two lawyers were unable to properly prepare the case for the defence, nor that they displayed lack of professional judgment or negligence in the conduct of the defence. The author also claims that he was not present at the hearing of his appeal before the Court of Appeal. However, the written judgment of the Court of Appeal reveals that the author was indeed represented before the Court by three lawyers, and there is no evidence that author's counsel acted negligently in the conduct of the appeal. The Committee therefore finds no violation of article 14, paragraph 3 (b) and (d).

6.3 As to the author's allegation that he was unable to have witnesses testify on his behalf, although one, Corporal Afflick, would have been readily available, it is to be noted that the Court of Appeal, as is shown in its written judgment, considered that the trial judge rightly refused to admit Corporal Afflick's evidence, since it was not part of the res gestae. The Committee observes that article 14, paragraph 3 (e), does not provide an unlimited right to obtain the attendance of any witness requested by the accused or his counsel. It is not apparent from the information before the Committee that the court's refusal to hear Corporal Afflick was such as to infringe the equality of arms between the prosecution and the defence. In the circumstances, the Committee is unable to conclude that article 14, paragraph 3 (e), has been violated.

6.4 There remains one final issue to be determined by the Committee: whether the directions to the jury by the trial judge were arbitrary or manifestly unfair, in violation of article 14, paragraph 1, of the Covenant. The Committee recalls that the judge denied the jury the possibility to arrive at a verdict of manslaughter, by instructing it that the issue of provocation did not arise in the case, thereby only leaving open the verdicts of "guilty of murder" or "not guilty of murder". It further observes that it is in general for the courts of States parties to the Covenant to evaluate facts and evidence in a given case, and for the appellate courts to review the evaluation of such evidence by the lower courts as well as the instructions by the jury. It is not in principle for the Committee to review the evidence and the judge's instructions, unless it is clear that the instructions were manifestly arbitrary or amounted to a denial of justice, or that the judge otherwise violated his obligation of impartiality.

6.5 The Committee has carefully examined whether the judge acted arbitrarily by withdrawing the possibility of a manslaughter verdict from the jury. It observes that this matter was put before, and dismissed by, the Court of Appeal of Jamaica. The Court of Appeal, it is true, did not examine the question of whether a verdict of manslaughter should, as a matter of Jamaican law, have been left open to the jury. The Committee considers, however, that it would have been incumbent upon author's counsel to raise this matter on appeal. In the circumstances, the Committee makes no finding of a violation of article 14, paragraph 1, of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee disclose no violation of any of the articles of the Covenant.

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ Decision of 8 November 1989 (G. S. v. Jamaica), para. 3.2.

b/ Communication No. 283/1988 (Aston Little v. Jamaica), views adopted on 1 November 1991.

B. Communication No. 255/1987, Carlton Linton v. Jamaica
(views adopted on 22 October 1992, forty-sixth session)

Submitted by: Carlton Linton (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of communication: 11 October 1987

Date of decision on admissibility: 24 July 1989

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 October 1992,

Having concluded its consideration of communication No. 255/1987, submitted to the Human Rights Committee by Mr. Carlton Linton under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Carlton Linton, a Jamaican citizen currently serving a sentence of life imprisonment at St. Catherine District Prison, Jamaica. He claims to be a victim of violations of his rights under articles 7 and 14 of the International Covenant on Civil and Political Rights by Jamaica. He is represented by counsel.

Facts as submitted

2.1 The author was arrested in November 1979 and charged with the murder, on 2 July 1979, of a security guard in the Parish of Clarendon. He was tried in the Home Circuit Court, Kingston, found guilty as charged and sentenced to death on 17 November 1981. On 21 April 1983, the Court of Appeal dismissed his appeal, treating the hearing of the application for leave to appeal as the hearing of the appeal itself. A further petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 25 January 1988. According to counsel, the author's death sentence was commuted to life imprisonment by the Governor-General of Jamaica early in 1991.

2.2 Mr. Linton was said to be one of three armed men who, on 2 July 1979, went to the Vere Technical High School in the Parish of Clarendon, and shot down the victim, one Simeon Jackson. The author was identified by police constable W. Barrett, the principal prosecution witness who had found the victim lying next to the guardhouse of the school, as one of three men who had been running into a nearby canefield; on the occasion, the author allegedly wore something around his waist that "looked like a gun".

2.3 During the trial, Mr. Linton made an unsworn statement from the dock. While this was incoherent, it was clear that he claimed to know nothing about

the crime. His statement was interpreted by the Court of Appeal as meaning that, out of malice, Mr. Barrett had accused him of the murder.

2.4 The author considers that the evidence against him was wholly circumstantial and contradictory, and that the evidence of the only witness that could have proven Mr. Barrett to be wrong was rejected on the ground that she had not submitted a timely report to the police. The author also notes that during his pre-trial detention, he suffered "beating(s) and torture for over two months" at the hand of the police, whom he also accuses of having "trumped up" the charges against him by transferring the preliminary investigation from one police station to another.

2.5 As to the conditions of detention, the author indicates that throughout the years spent on death row, he experienced physical abuse and psychological torture. From 1986, the situation allegedly deteriorated gradually; thus, on 20 November 1986, warders allegedly led a party consisting of about 50 men who came to his cell early in the morning with clubs, batons and electric wire, forced him out and beat him unconscious. At around midnight the same day, he found himself on a stretcher in the hospital of Spanish Town, in severe pain, with bruises all over his body and blood trickling from his head. At 1 a.m., he was taken back to the prison and transferred to another cell. Subsequently, he contends, the warders tried to depict him as a "subversive character", so as to cover up the brutalities to which he had been subjected.

2.6 Towards the end of January 1988, five inmates were transferred to the death cells. When the rumour spread that a warrant for the execution of the author and of the inmate occupying the neighbouring cell, F. M., had also been issued, and warders began to tease the author and F. M. by describing in detail all the stages of the execution, the author and F. M. began to plan their escape. They sawed off the bars in front of their doors and, on 31 January 1988, attempted to escape by climbing over the prison walls. Warders fired at them; the author was hit in the hip, whereas F. M. was fatally shot in the head, allegedly after indicating his surrender.

2.7 The author notes that the injuries sustained in the escape attempt have left him handicapped, as medical treatment received subsequently was inadequate; as a result, he cannot walk properly. He considers that he cannot be held responsible for the escape attempt, on account of what had occurred previously. He further notes that he complained to the official charged with the investigation of the incident and to the prison chaplain. Since that time, he has not been given further information about the result of the investigation and his complaint.

Complaint

3.1 The author complains that he did not receive a fair trial, in violation of article 14, in that the trial judge misdirected the jury because she did not properly summarize the legal requirements of common design in relation to murder and manslaughter. It is submitted that the judge's direction on common design would at best have justified an indictment on burglary, since the jury was not told to ponder the question of whether the author became a party to the attack on Mr. Jackson and whether he joined in it with the intention of causing serious physical injury or death.

3.2 The author further contends, without providing additional details, that he was poorly assisted by the lawyer assigned to him for the preparation of his

defence and during the trial. He also claims that he did not have adequate opportunities to consult with this lawyer prior to and during the trial.

3.3 The treatment suffered by the author during pre-trial detention (in 1979-1980) and on death row (especially in November 1986 and January 1988) is said to amount to a violation of articles 7 and 10, paragraph 1, of the Covenant.

State party's information and observations

4. In its submission under rule 91 of the Committee's rules of procedure, the State party argued that the communication was inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, as the author had failed to avail himself of constitutional remedies in the Supreme (Constitutional) Court of Jamaica, thereby seeking to enforce his right to a fair trial under Section 20 of the Jamaican Constitution, in accordance with the procedure under Section 25 of the Constitution.

Decision on admissibility

5.1 During its thirty-sixth session in July 1989, the Committee considered the admissibility of the communication. While taking note of the State party's contention that the communication was inadmissible on account of the author's failure to avail himself of constitutional remedies, the Committee concluded that recourse to the Supreme (Constitutional) Court was not a remedy available to the author within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

5.2 The Committee further noted that the application of domestic remedies since the trial of the author in 1981 had already been unreasonably prolonged, and held that the requirements of article 5, paragraph 2 (b), had been met.

5.3 On 24 July 1989, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7, 10 and 14 of the Covenant.

State party's objections to the decision on admissibility

6.1 In a submission dated 11 March 1991, the State party contends that the Committee's admissibility decision reflects a misunderstanding of the operation of Sections 25(1) and 25(2) of the Jamaican Constitution. The right to apply for redress under Section 25(1) is "without prejudice to any other action with respect to the same matter which is lawfully available". The only limitation in Section 25(2) is not applicable to the case in the State party's opinion, since the alleged breach of the right to a fair trial was not an issue in the author's criminal appeals:

> "... If the contravention alleged was not the subject of the criminal law appeal, ex hypothesi, that appeal could hardly constitute an adequate remedy for that contravention. The decision of the Committee would render meaningless ... the constitutional rights of Jamaicans and persons in Jamaica, by its failure to distinguish between the right to appeal against the verdict and sentence of the court in a criminal case, and the ... right to apply for constitutional redress ...".

6.2 With respect to the Committee's finding that the application of domestic remedies had already been unreasonably prolonged, the State party notes that

nothing in the author's complaint would point to any State party responsibility for such delays as may have occurred in the judicial proceedings. Accordingly, it requests the Committee to review the decision on admissibility.

Post-admissibility proceedings and examination of merits

7.1 The Committee has taken note of the State party's arguments on admissibility formulated after the Committee's decision declaring the communication admissible, especially in respect of the availability of constitutional remedies which the author may still pursue. It recalls that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed.

7.2 However, the Committee also recalls that by submission of 10 October 1991 concerning another case, a/ the State party indicated that legal aid is not provided for constitutional motions, and that it has no obligation under the Covenant to make legal aid available in respect of such motions, as they do not involve the determination of a criminal charge, as required under article 14, paragraph 3 (d), of the Covenant. In the view of the Committee, this supports the finding, made in the decision on admissibility, that a constitutional motion is not an available remedy for an author who has no means of his own to pursue it. In this context, the Committee observes that the author does not claim that he is absolved from pursuing constitutional remedies because of his indigence; rather it is the State party's unwillingness or inability to provide legal aid for the purpose that renders the remedy one that need not be pursued for purposes of the Optional Protocol.

7.3 The Committee further notes that the author was arrested in 1979, tried and convicted in 1981, and that his appeal was dismissed in 1983. The Committee deems that for purposes of article 5, paragraph 2 (b), of the Optional Protocol, the pursuit of constitutional remedies would, in the circumstances of the case, entail an unreasonable prolongation of the application of domestic remedies. Accordingly, there is no reason to revise the decision on admissibility of 24 July 1989.

8.1 The Committee is called upon to determine whether (a) the author was denied a fair trial, in violation of article 14, because of the alleged failure of the judge properly to direct the jury on the issue of common design, and (b) the treatment he was subjected to in detention was contrary to articles 7 and 10.

8.2 The Committee notes with regret the absence of cooperation from the State party in not making any submissions concerning the substance of the matter under consideration. It is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party make available to the Committee all the information at its disposal; this is so even where the State party objects to the admissibility of the communication and requests the Committee to review its admissibility decision, as requests for a review of admissibility are examined by the Committee in the context of the consideration of the merits of a case, pursuant to rule 93, paragraph 4, of the Committee's rules of procedure. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

8.3 In respect of the claim of unfair trial, the Committee recalls that it is in general for the courts of States parties to the Covenant to evaluate the facts and the evidence in a given case, and for the appellate courts to review

the evaluation of such evidence by the lower courts. It is not in principle for the Committee to review the evidence and the judge's instructions to the jury in a trial by jury, unless it can be ascertained that the instructions were clearly arbitrary or amounted to a denial of justice, or that the judge otherwise violated his obligation of independence and impartiality. In Mr. Linton's case, the material before the Committee does not reveal that the instructions to the jury suffered from such defects; it accordingly concludes that there has been no violation of article 14, paragraph 1.

8.4 In respect of the author's contention that he was poorly represented and had inadequate opportunities for the preparation of his defence, the Committee notes that these claims were not, on the basis of the information before it, placed before the Jamaican courts. It further observes that these claims have not been substantiated to the extent that they would justify a finding of a violation of article 14, paragraph 3 (b) and (d), of the Covenant.

8.5 Concerning the author's claim of ill-treatment during pre-trial detention and on death row, the Committee deems it appropriate to distinguish between the various allegations. Concerning the claim of ill-treatment during pre-trial detention, the Committee notes that this has not been further substantiated. Other considerations apply to the claims relating to the author's treatment in November 1986 and January 1988, which have not been refuted by the State party. In the absence of such detailed refutation, the Committee considers that the physical abuse inflicted on the author on 20 November 1986, the mock execution set up by prison warders and the denial of adequate medical care after the injuries sustained in the aborted escape attempt of January 1988 constitute cruel and inhuman treatment within the meaning of article 7 and, therefore, also entail a violation of article 10, paragraph 1, of the Covenant, which requires that detained persons be treated with respect for their human dignity.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

10. The Committee urges the State party to take effective steps (a) to investigate the treatment to which Mr. Linton was subjected in November 1986 and subsequent to his aborted escape attempt in January 1988, (b) to prosecute any persons found to be responsible for his ill-treatment, and (c) to grant him compensation.

11. The Committee would wish to receive information, within ninety days, on any relevant measures adopted by the State party in respect of the Committee's views.

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ Communication No. 283/1988 (Aston Little v. Jamaica), views adopted on 1 November 1991.

C. Communication No. 263/1987, M. González del Río v. Peru
(views adopted on 28 October 1992, forty-sixth session)

Submitted by: Miguel González del Río

Alleged victim: The author

State party concerned: Peru

Date of communication: 19 October 1987

Date of decision on admissibility: 6 November 1990

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 1992,

Having concluded its consideration of communication No. 263/1987, submitted to the Human Rights Committee by Mr. Miguel González del Río under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and noting with concern that no information whatever has been received from the State party

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Miguel González del Río, a naturalized Peruvian citizen of Spanish origin, at present residing in Lima, Peru. He claims to be a victim of violations by Peru of articles 9, paragraphs 1 and 4, 12, 14, paragraphs 1 and 2, 17 and 26 of the International Covenant on Civil and Political Rights.

Facts as submitted

2.1 From 10 February 1982 to 28 December 1984, the author served as Director-General of the penitentiary system of the Peruvian Government. By Resolution No. 072-85/CG of 20 March 1985, the Comptroller General of Peru accused the author and several other high officials of illegal appropriation of government funds, in connection with purchases of goods and the award of contracts for the construction of additional penitentiaries. With retroactive effect, Mr. González' resignation, tendered on 28 December 1984, was transformed into a dismissal.

2.2 The author contends that a libelous press campaign against him and the other accused in the case, including the former Minister of Justice, Enrique Elías Laroza, accompanied the 1986 presidential elections in Peru. In spite of this campaign, led by papers loyal to the Government, Mr. Elías Laroza was elected deputy. Because of his parliamentary immunity, Mr. Elías Laroza, the principal target of the Comptroller General's report, was not subjected to arrest or detention, although a congressional investigation as to the charges that could be filed against the former Minister was initiated. He notes that

the lower officials, including himself, have been subjected to detention or threats of detention.

2.3 The author filed an action for amparo before the Vigésimo Juzgado Civil of Lima to suspend the Resolution of the Comptroller General. The judge granted the suspension and the Comptroller appealed, claiming that an action of amparo was premature and that the author should first exhaust available administrative remedies. The Court, however, ruled that in the circumstances it was not necessary to take the matter before the administrative tribunals, and as to the merits of the case, that the right of defence of the author and the other accused had been violated, since they had been ordered by the Comptroller General to make payments without proper determination of the sum or opportunity to study the books and compare the figures. The Court further decided that the Comptroller General did not have the authority to dismiss the author, nor to give retroactive effect to his resolutions. On appeal, however, the Superior Court of Lima reversed this finding, and the Supreme Court confirmed. The author then filed for amparo with the Constitutional Court (Tribunal de Garantías Constitucionales) alleging abuse of power by the Comptroller General, breach of the constitutional rights of defence and denial of access to documentation for the defence. By judgement of 15 September 1986, the Constitutional Court decided in the author's favour, ordering the suspension of the Comptroller's Resolution, and declaring the dismissal order to be unconstitutional. The author complains that although the Constitutional Court referred the case back to the Supreme Court for appropriate action, none had been taken as of March 1992, five and a half years later, despite repeated requests from the author.

2.4 In spite of the judgment of the Constitutional Court, the Comptroller's Office initiated criminal proceedings for fraud against the author; Mr. González applied for habeas corpus with the criminal court of Lima on 20 November 1986, against the examining magistrate No. 43; his action was dismissed on 27 November 1986. The author appealed the following day; the Tenth Criminal Tribunal (Décimo Tribunal Correccional de Lima) dismissed the appeal on 5 December 1986.

2.5 Undeterred, the author filed an action for nullity of his indictment (recurso de nulidad); on 12 December 1986, the court referred the matter to the Supreme Court. On 23 December 1986, the Second Criminal Chamber of the Supreme Court confirmed the validity of the indictment. Against this decision, the author filed an "extraordinary appeal for cassation" (recurso extraordinario de casación) with the Constitutional Court. On 20 March 1987, the Constitutional Tribunal held, in a split decision (four judges against two), that it could not compel the Supreme Court to execute the Constitutional Court's decision of 15 September 1986, since the author had not been subjected to detention and the Tribunal's earlier decision could not be invoked in the context of the request for amparo filed against examining magistrate No. 43.

2.6 With respect to the criminal action for fraud and embezzlement of public funds pending against the author, the Twelfth Criminal Tribunal of Lima (Duodécimo Tribunal Correccional de Lima) decided, on 9 December 1988 and upon the advice of the Chief criminal prosecutor of Peru, to file the case and suspend the arrest order against the author, as the preliminary investigations had failed to reveal any evidence of fraud committed by him.

2.7 The author states that this decision notwithstanding, another parallel criminal matter remains pending since 1985, and although investigations have not

resulted in any formal indictment, an order for his arrest remains pending, with the result that he cannot leave Peruvian territory. This, according to the author, is where matters currently stand. In a letter dated 20 September 1990, he states that the Supreme Court has "buried" his file for years, and that, upon inquiry with the Court's president, he was allegedly told that the proceedings would "be delayed to the maximum possible extent" while he [the Court's president] was in charge, since the matter was a political one and he would not like the press to question the final decision, which would obviously be adopted in Mr. González' favour ("... que el caso iba a ser retardado al máximo mientras él estuviera a cargo, puesto que tratándose de un asunto político no quería que la prensa cuestionara el fallo final, obviamente a mi favor."). The author contends that the Supreme Court has no interest in admitting that its position is legally untenable, and that this explains its inaction.

Complaint

3.1 The author complains that he has not been reinstated as a public official, although he has been cleared of the charges against him by the decision of the Constitutional Tribunal and the decision of the Twelfth Criminal Court suspending the proceedings against him. He further alleges that his reputation and honour will be tainted as long as the Supreme Court fails to implement the decision of the Constitutional Court of 15 September 1986.

3.2 The author further complains that as one arrest warrant against him remains pending, his freedom of movement is restricted, in that he is prevented from leaving the territory of Peru.

3.3 It is further claimed that the proceedings against the author have been neither fair nor impartial, in violation of article 14, paragraph 1, as may be seen from the politically motivated statements of magistrates and judges involved in his case (see statement referred to in paragraph 2.7 above).

3.4 Finally, the author contends that he is a victim of discrimination and unequal treatment, because in a case very similar to his own, concerning a former Minister, the Attorney-General allegedly declared that it would not be possible to accuse lower-level officials as long as the legal issues concerning this former minister had not been solved. The author contends that his treatment constitutes discrimination based on his foreign origin and on his political opinions.

Issues and proceedings before the Committee

4.1 By decision of 15 March 1988, the Committee's Working Group transmitted the communication to the State party, requesting it, under rule 91 of the rules of procedure, to provide information and observations on the admissibility of the communication. On 19 July 1988, the State party requested an extension of the deadline for its submission, but despite two reminders addressed to it, no information was received.

4.2 During its fortieth session in November 1990, the Committee considered the admissibility of the communication. With respect to the requirement of exhaustion of domestic remedies, it concluded that there were no effective remedies available to the author in the circumstances of his case which he should have pursued. It further noted that the implementation of the Constitutional Court's decision of 15 September 1986 had been unreasonably

prolonged within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

4.3 On 6 November 1990, the Committee declared the communication admissible. It requested the State party to clarify exactly what charges had been brought against the author and to forward all relevant court orders and decisions in the case. It further asked the State party to clarify the powers of the Constitutional Court and to explain whether and in which way the Constitutional Court's decision of 15 September 1986 had been implemented. After a reminder addressed to it on 29 July 1991, the State party requested, by note of 1 October 1991, an extension of the deadline for its submission under article 4, paragraph 2, of the Optional Protocol until 29 January 1992. No submission has been received.

4.4 The Committee notes with concern the lack of any co-operation on the part of the State party, both in respect of the admissibility and the substance of the author's allegations. It is implicit in rule 91 of the rules of procedure and article 4, paragraph 2, of the Optional Protocol, that a State party to the Covenant investigate in good faith all the allegations of violations of the Covenant made against it and in particular against its judicial authorities, and to furnish the Committee with detailed information about the measures, if any, taken to remedy the situation. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

5.1 As to the alleged violation of article 9, paragraphs 1 and 4, the Committee notes that the material before it does not reveal that, although a warrant for the author's arrest was issued, Mr. González del Río has in fact been subjected to either arrest or detention, or that he was at any time confined to a specific, circumscribed location or was restricted in his movements on the State party's territory. Accordingly, the Committee is of the view that the claim under article 9 has not been substantiated.

5.2 The Committee has noted the author's claim that he was not treated equally before the Peruvian courts, and that the State party has not refuted his specific allegation that some of the judges involved in the case had referred to its political implications (see para. 2.7 above) and justified the courts' inaction or the delays in the judicial proceedings on this ground. The Committee recalls that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception. It considers that the Supreme Court's position in the author's case was, and remains, incompatible with this requirement. The Committee is further of the view that the delays in the workings of the judicial system in respect of the author since 1985 violate his right, under article 14, paragraph 1, to a fair trial. In this connection, the Committee observes that no decision at first instance in this case had been reached by the autumn of 1992.

5.3 Article 12, paragraph 2, protects an individual's right to leave any country, including his own. The author claims that because of the arrest warrant still pending, he is prevented from leaving Peruvian territory. Pursuant to paragraph 3 of article 12, the right to leave any country may be restricted, primarily, on grounds of national security and public order (ordre public). The Committee considers that pending judicial proceedings may justify restrictions on an individual's right to leave his country. But where the judicial proceedings are unduly delayed, a constraint upon the right to leave the country is thus not justified. In this case, the restriction on Mr. González' freedom to leave Peru has been in force for seven years, and the

date of its termination remains uncertain. The Committee considers that this situation violates the author's rights under article 12, paragraph 2; in this context, it observes that the violation of the author's rights under article 12 may be linked to the violation of his right, under article 14, to a fair trial.

5.4 On the other hand, the Committee does not find that the author's right, under article 14, paragraph 2, to be presumed innocent until proved guilty according to law was violated. Whereas the remarks attributed to judges involved in the case may have served to justify delays or inaction in the judicial proceedings, they cannot be deemed to encompass a pre-determined judgement on the author's innocence or guilt.

5.5 Finally, the Committee considers that what the author refers to as a libelous and defamatory press campaign against him, allegedly constituting an unlawful attack on his honour and reputation, does not raise issues under article 17 of the Covenant. On the basis of the information before the Committee, the articles published in 1986 and 1987 about the author's alleged involvement in fraudulent procurement policies in various local and national newspapers cannot be attributed to the State party's authorities; this is so even if the newspapers cited by the author were supportive of the government then in force. Moreover, the Committee notes that it does not appear that the author instituted proceedings against those he considered responsible for the defamation.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 12, paragraph 2, and 14, paragraph 1, of the Covenant.

7. The Committee is of the view that Mr. González del Río is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy, including the implementation of the decision of 15 September 1986, delivered in his favour by the Constitutional Court. The State party is under an obligation to ensure that similar violations do not occur in the future.

8. The Committee would wish to receive information, within ninety days, on any relevant measures taken by the State party in respect of the Committee's views.

[Done in English, French, Russian and Spanish, the English text being the original version.]

D. Communication No. 274/1988, Loxley Griffiths v. Jamaica (views adopted on 24 March 1993, forty-seventh session)*

Submitted by:	Loxley Griffiths (represented by counsel)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	16 January 1988
Date of decision on admissibility:	16 October 1989

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 March 1993,

Having concluded its consideration of communication No. 274/1988, submitted to the Human Rights Committee on behalf of Mr. Loxley Griffiths under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and by the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication, dated 16 January 1988, is Loxley Griffiths, a Jamaican citizen currently serving a life sentence at the South Camp Rehabilitation Centre in Kingston, Jamaica. He claims to be a victim of violations by Jamaica of articles 7 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 The author was charged with the murder, on 19 August 1978, of his wife, Joy Griffiths. He was tried in the Home Circuit Court of Kingston on 11 and 12 February 1980, found guilty as charged by the jury, convicted and sentenced to death. The Court of Appeal of Jamaica dismissed his appeal on 28 May 1981; it issued a written judgement on 26 October 1981. On 20 February 1991, the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal. The author contends that such delays as occurred in the judicial proceedings are attributable to factors beyond his control.

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* Pursuant to rule 85 of the Committee's rules of procedure, Committee member Mr. Laurel Francis did not take part in the adoption of the Committee's views.

2.2 The author married Joy Griffiths on 18 June 1977. Six weeks prior to her death, she moved out of their residence and returned to the home of her mother, Violeta Mercurious. The prosecution's case was that on 19 August 1978 at around 7 p.m., the author arrived at the gate to Mrs. Mercurious' yard and began talking to his wife, who was washing at a stand-pipe. This was witnessed by Mrs. Mercurious and a friend of hers, Monica Dacres, who testified against the author. Ms. Dacres testified that Mr. Griffiths wore a bush jacket, under which his right arm was concealed. Both women testified that after some minutes of increasingly heated conversation, the author produced a machete from under his jacket, with which he dealt his wife two blows. According to the forensic expert who carried out the post-mortem examination, Joy Griffiths died as a result of hypovelmic and neurogenic shock, due to massive loss of blood from a wound in the neck.

2.3 Under cross-examination, the author admitted that his relations with his wife's family were poor but contended that he loved his wife. When he arrived at the gate on the evening in question, he saw Joy Griffiths sitting on the lap of a man called "Roy". When he remonstrated with her, she reacted angrily; the author then requested that she return some money which he had given her for safekeeping, but she refused. A quarrel ensued, and the author struck his wife with his fist. At this point, Joy Griffiths' brother, who had been watching the scene from the door, attacked the author with a cutlass. He struck two blows at the author which the latter avoided; instead, the blows fatally wounded Joy Griffiths. The author denied having taken a machete to the home of his wife's mother.

2.4 The author indicates that a warrant for his execution was issued on 22 December 1987, to be carried out on 5 January 1988. On 4 February 1991, the author informed the Committee that he had been transferred from the death row section of St. Catherine District Prison to the South Camp Rehabilitation Centre in Kingston. On 24 January 1992, counsel confirmed that his client's death sentence had been commuted to life imprisonment on 17 September 1990.

Complaint

3.1 The author alleges that his trial was unfair, and that several irregularities occurred in its course. He contends that, after his conviction, he learned that the Court Registrar was the nephew of the deceased. He complained to the Chief Justice and to the Ombudsman about the matter but received no reply; it is not apparent, however, that the issue was raised on appeal. Furthermore, it is submitted that the Registrar and the mother of the deceased were seen talking to members of the jury during the trial, and that the Registrar took the jury to the verdict room. The author adds that he was able to meet the trial judge, who is now retired, on 5 September 1988; the judge allegedly admitted that irregularities had occurred during the trial, but added that there was nothing he could do to help the author.

3.2 The author further argues that there were contradictions in the testimony given by Monica Dacres and the mother of the deceased, which the judge did not put to the jury. He further alleges that the judge misdirected the jury on the issue of manslaughter, and that he was wrong in refusing to leave the issue of provocation to the jury. In the author's opinion, since there was evidence of provocation, the judge was obliged to let the jury determine whether the requirements for the defence of provocation, governed by the Offences against the Person (Amendment) Act of 1958, had been satisfied, namely, that the author had in fact lost his self-control, and that a reasonable person would have lost

his self-control in the circumstances. Instead, the judge directed the jury as follows:

> "You must also be satisfied that the killing was unprovoked. Now when we speak of provocation in that sense we mean legal provocation into which I do not propose to go because, as you heard me indicate to learned counsel ... when he attempted to raise this matter of provocation to you, that there was no evidence before you on which the legal provocation which the law requires arises in this case and, as a consequence, it does not arise in this case for your consideration."

3.3 Finally, counsel submits that the time spent on death row, close to 11 years prior to commutation of sentence, amounts to cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant.

3.4 With respect to the requirement of exhaustion of domestic remedies, the author concedes that it is in principle for the appellant to seek constitutional protection and to show that the delays in the proceedings are not attributable to himself. He reiterates, however, that the delays in his case cannot be attributed to him. He emphasizes that he unsuccessfully requested the written judgements in his case, which are a prerequisite for lodging a petition for leave to appeal with the Judicial Committee. In this context, counsel observes that instructions from the author to a London law firm which had agreed to represent him before the Judicial Committee of the Privy Council on a pro bono basis, were received in the summer of 1988. Further court documents requested by this firm arrived in August 1988. The petition was returned by counsel on 17 October 1988, with a request for further information about the grounds of appeal which had been argued but not specified in the judgement of the Court of Appeal. Numerous attempts were made to obtain this information from the Court of Appeal of Jamaica and the author's legal aid representative for the appeal. Both replied in March 1990 and January 1991, respectively, but could not provide the information requested. Counsel therefore argues such delays as occurred were not attributable to negligence on the author's part.

State party's information and observations

4.1 By submission of 8 December 1988, the State party argued that the communication was inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, as the author's case had, at that time, not been adjudicated by the Judicial Committee of the Privy Council. It added that legal aid is available for this purpose under Section 3, paragraph 1, of the Poor Prisoners' Defence Act.

4.2 By further submissions of 10 January and 7 September 1990, made after the adoption of the Committee's decision on admissibility, the State party affirmed that the rules of procedure of the Judicial Committee of the Privy Council do not make the production of a written judgement from the Court of Appeal a prerequisite for a petition for special leave to appeal to the Privy Council. Thus, although Rule 4 provides that a petitioner should lodge the judgement from which leave to appeal is sought, "judgement" is defined in Rule 1 as including a "decree, order, sentence, or decision of any court, judge, or judicial officer". The State party submitted that the order or decision of the Court of Appeal, as distinct from the reasoned judgement, was a sufficient basis for a petition for special leave to appeal to the Privy Council, and that the Judicial Committee had heard appeals on the basis of the mere order or decision of the Court of Appeal dismissing the appeal.

4.3 The State party contends that a copy of the written judgement of the Court of Appeal would have been available to the author's counsel from the date of its delivery, that is 26 October 1981. With regard to the alleged unreasonable delays in the judicial proceedings, the State party argues that no evidence establishing any government responsibility in this respect has been offered.

4.4 With respect to the allegation of unfair trial, finally, the State party submits, by reference to the Committee's jurisprudence, that the facts relied upon by the author merely seek to raise issues of facts and evidence in the case, which the Committee is not competent to evaluate. a/

Decision on admissibility and review thereof

5.1 During its thirty-seventh session in October 1989, the Committee considered the admissibility of the communication. With respect to the requirement of exhaustion of domestic remedies, the Committee observed that the author's failure, at that time, to petition the Judicial Committee of the Privy Council for special leave to appeal could not be attributed to him, as relevant court documents, which are a prerequisite for a petition for special leave to appeal to be entertained, had not been made available to him. The Committee further noted that the author's appeal had been dismissed in May 1981 and concluded that the pursuit of domestic remedies had been "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

5.2 On 16 October 1989, the Committee declared the communication admissible inasmuch as it appeared to raise issues under article 14 of the Covenant.

6.1 The Committee has taken note of the State party's contention, made after the adoption of the decision on admissibility, that the written judgement of the Court of Appeal would have been available to the author and his counsel upon delivery, i.e. as of 26 October 1981, and that there is no evidence of any State party responsibility concerning delays in the pursuit of domestic remedies. The Committee takes the opportunity to expand on its admissibility findings.

6.2 The Committee need not address the question of whether the Judicial Committee may consider petitions for special leave to appeal in the absence of a written judgement from the Court of Appeal of Jamaica, because the author's petition, dismissed on 20 February 1991, had in fact been accompanied by said judgement. As to the issue of delays in the judicial proceedings, the Committee considers that the State party has failed to show that the author, or his counsel, acted negligently in the pursuit of available remedies; the author's account of his efforts to obtain the written judgement of the Court of Appeal has not been challenged. In this context, the Committee reaffirms that the adoption of the written judgement cannot of itself be equated with "availability" of the same to either the appellant or to his counsel, and that there should be reasonably efficient channels through which either appellant or counsel may request and obtain relevant court documents. b/

6.3 For the above reasons, the Committee considers that there is no reason to reverse the decision on admissibility of 16 October 1989.

Examination of the merits

7.1 Two issues of substance are before the Committee: (a) whether alleged irregularities during the trial amounted to a violation of article 14 of the

Covenant, and (b) whether prolonged detention on death row constitutes cruel, inhuman and degrading treatment within the meaning of article 7.

7.2 With respect to the author's claim under article 14, paragraph 1, the Committee recalls that it is in general for the courts of States parties to the Covenant to evaluate facts and evidence in a given case, and for the appellate courts to review the evaluation of such evidence by the lower courts. It is not in principle for the Committee to review the evidence and the judge's instructions to the jury, unless it is clear that the instructions were manifestly arbitrary or amounted to a denial of justice, or that the judge otherwise violated his obligation of impartiality. On the basis of the information before it, the Committee cannot conclude that the judge's instructions to the jury were arbitrary or biased, in particular with regard to the issue of legal provocation, where the judge directed the jury in a manner that has not been shown to be inconsistent with the applicable Jamaican law. The Committee, therefore, cannot find that the judge's instructions reveal a violation of article 14, paragraph 1, of the Covenant.

7.3 In respect of the author's claim concerning irregularities in the trial, including his allegation that two prosecution witnesses sought to influence members of the jury, the Committee notes that these allegations have not been substantiated as to lead the Committee to conclude that the author was denied the right to a fair trial. Moreover, it is to be noted that this latter allegation was not, on the basis of the information available to the Committee, placed before the Jamaican courts or any other competent judicial instance. In the circumstances, the Committee finds no violation of article 14.

7.4 With regard to the author's claim under article 7, the Committee notes that this allegation was substantiated at a late stage, after the adoption of the Committee's decision to declare the communication admissible in respect of article 14 of the Covenant, and after the commutation of the death sentence and the author's transfer from the death row section of St. Catherine District Prison to another penitentiary. Moreover, the Committee notes that the question whether prolonged detention on death row constitutes cruel, inhuman and degrading treatment was not placed before the Jamaican courts, nor brought before any other competent authority. The Committee is therefore unable to consider this allegation on its merits. It reiterates, however, that prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment, even if they may be a source of mental strain and tension for convicted prisoners. This also applies to appeal and review proceedings in cases involving capital punishment, although an assessment of the circumstances of each case would be necessary. In States whose judicial system provides for review of sentencing policies, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any provision of the Covenant.

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ Communication No. 369/1989 (G. S. v. Jamaica), decision of 8 November 1989, para. 3.2.

b/ See communication No. 233/1987 (M. F. v. Jamaica), decision of 21 October 1991, para. 6.2.

E. Communication No. 282/1988, Leaford Smith v. Jamaica (views adopted on 31 March 1993, forty-seventh session)*

Submitted by: Leaford Smith (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of communication: 15 February 1988 (initial submission)

Date of decision on admissibility: 17 October 1989

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1993,

Having concluded its consideration of communication No. 282/1988, submitted to the Human Rights Committee by Mr. Leaford Smith under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Leaford Smith, a Jamaican citizen awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of violations of his human rights by Jamaica.

Facts as submitted

2.1 The author was arrested on 27 October 1980 and charged with the murder, on 26 October 1980 in the Parish of St. James, of one Errol McGhie. On 26 January 1982, he was convicted and sentenced to death in the St. James Circuit Court. The Jamaican Court of Appeal dismissed his appeal on 24 September 1984. A subsequent petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed in February 1987, on the ground that there was no written judgement of the Jamaican Court of Appeal. A second petition for special leave to appeal was prepared and filed by the author's pro bono representative in London; this was dismissed on 15 December 1987 on unspecified grounds.

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* Pursuant to rule 85 of the Committee's rules of procedure, Committee member Mr. Laurel Francis did not take part in the adoption of the Committee's views.

2.2 At the trial, the brother of the deceased, Owen McGhie, testified that on the evening of 26 October 1980, he, the deceased and three other men were talking on the main road when the author came out of a field with a sawn-off shotgun and fired a shot into the group. The prosecution further relied on sworn evidence given during the preliminary inquiry, held between 16 January and 26 March 1981, by another brother of the deceased, Merrick McGhie, and by one Ephel Williams. Neither witness was present at the trial.

2.3 The author gave a sworn statement from the dock, testifying that the deceased and others, including Owen McGhie, had lain in wait for him with the gun because they suspected him of having warned a group of "labourites" (supporters of the Jamaican Labour Party) about a plan to attack them. The author further claimed that one Lloyd Smart had aimed the gun at him and that it had gone off accidentally, killing Errol McGhie, as he, Leaford Smith, tried to knock it out of Lloyd Smart's hand.

2.4 According to the author, the prosecution's evidence, according to which the fatal shot was fired from a distance of about 5 metres, was at odds with the medical evidence, which estimated that the fatal shot was fired from a distance of no more than two feet. Besides, the author states, a shot fired from a 24-inch sawn-off shotgun into a gathering of people would have certainly resulted in the death or injury of more than one individual.

2.5 As to the appeal, the author indicates that the Court of Appeal only gave an oral judgement; he was subsequently informed by the Jamaica Council for Human Rights that no written judgement was to be expected.

2.6 On 17 November 1987, a warrant was issued for the execution of the author on 24 November 1987. A request for stay of execution was submitted by the author's counsel to the Governor-General of Jamaica, on the ground that new evidence had been obtained, which would justify a re-trial. Excerpts of counsel's petition read as follows:

> "... I have had an opportunity to read the Affidavit of Ephel Williams and having regard to all the circumstances surrounding this case, it would appear that his disclosures as to what really transpired on the night of 26 October 1980, would, at the very least, influence Your Excellency in Council to grant a stay of execution so that these said disclosures may be carefully and diligently investigated and studied.
>
> "The evidence given by the investigating officer at page 40 of the trial transcript disclosed that, when Leaford Smith was cautioned at the Montego Bay Police Station, he stated: 'Me never mean to shoot him'. At page 41 and 46, this statement is repeated to the same effect.
>
> "This development would have attracted a verdict of manslaughter if the truth had been uncovered then ...
>
> "One has to bear in mind that at that time the unlawful possession of a firearm attracted a mandatory sentence of life imprisonment, hence the basis to fabricate and implicate each other, not being unmindful of the more serious charge of murder.
>
> "While the Crown is not saddled with the burden of establishing 'motive', and no motive was established in this case, the Crown witnesses

stated that there was a good relationship between Mr. Smith and Mr. Errol McGhie ...

"This fact would further underscore the credible nature of Ephel William's affidavit which is further buttressed by the pathologist's evidence in which he stated that Errol McGhie was shot within a distance of two feet as contrasted with the Crown's version of eighteen feet ...".

2.7 The stay of execution was granted; pursuant to Section 29, paragraph 1 (a), of the Judicature (Appellate Jurisdiction) Act, the Governor-General referred the case back to the Court of Appeal for review. a/ Subsequently, the Court of Appeal granted leave to adduce new evidence in the case and a hearing was set for 29 February 1988; the hearing was postponed, reportedly on the ground that some of the relevant documents could not be located.

2.8 Under cover of a letter dated 10 January 1989, the author forwards a letter from his counsel which indicates that, on 5 December 1988, the Court of Appeal rejected the new evidence. Three affidavits were presented to the Court, all of which contradicted the evidence presented by the prosecution and the defence during the author's trial. Thus, the affidavits filed by Merrick McGhie and by Ephel Williams contradicted their own sworn evidence in support of the prosecution's case. Neither Mr. McGhie nor Mr. Williams can be located by the authorities. The third affidavit, by one Angela Robinson, contradicts in part the author's evidence. Although this witness was present in court on 5 December 1988, the judges declined to hear her, holding that the affidavits did not satisfy the test for the admissibility of fresh evidence. b/

2.9 The authors of the above-mentioned affidavits deny that Mr. Smith had emerged from the yamfield and fired into a group of people including the deceased. The affidavit of Merrick McGhie, dated 1 December 1987, states, in particular, "[t]hat any story about the killing of my brother that suggests that he was shot at deliberately is not true ... The insistence of my brother Owen that Leaford Smith shot my brother Errol intentionally was done only out of a desire to avoid implicating himself in the offence of unlawful possession of a firearm".

2.10 Ephel Williams, in his affidavit dated 8 August 1984, states: "The first time that I was called to give evidence at the Gun Court, I ... did not attend. On the second occasion, I was served a subpoena. I did not go to give evidence at the trial because I could not continue to be part of the plot to blame Leaford Smith for shooting Errol ... and I also feared, on good grounds, that if I attended court and told the truth, all Errol's relatives, especially Owen McGhie, would hurt me badly. ... That Owen, Merrick, Errol, Leaford, Junior James and I have lived fairly close to one another as we stand for and support socialism as a political belief and out of loyalty to them, but more so out of fear of reprisal I went along with that story and this is the reason why I previously told an untrue story. That neither Owen nor Leaford told the truth to the court. The gun went off when it was being passed from Leaford Smith to Owen McGhie who wanted to look at it".

Complaint

3.1 The author alleges that his trial was unfair. He contends that he had inadequate time to prepare his defence. He submits that he could only consult with his lawyer on the opening day of the trial. Furthermore, he was informed that one of the jurors was seen at the home of the deceased the night before the

start of the trial. The judge, apparently, did not investigate the matter. In this context, he points out that although his trial lasted two days, it took the jury less than 20 minutes to return their verdict. The author further complains that the trial judge did not address the discrepancy between the evidence of the main witness for the prosecution and that of the pathologist. It is submitted that, although there were at least five potential witnesses to the shooting, only two were summoned to the trial, of whom only Owen McGhie said he had seen the actual shot being fired.

3.2 As to the appeal, the author submits that although the Jamaican Court of Appeal is not bound by law to produce a written judgement, it ought to do so in the interest of justice, especially in capital cases. He further claims that the absence of a written judgement deprived him of an effective appeal to the Judicial Committee of the Privy Council, since that body dismissed his petition on the ground that the merits of an appeal against conviction could not be considered.

State party's observations on admissibility

4. In its submission, dated 7 December 1988, the State party contends that the communication is inadmissible on the ground of non-exhaustion of domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol, without providing further explanations.

Committee's decision on admissibility

5. On 17 October 1989, the Committee declared the communication admissible in respect of article 14 of the Covenant. It noted the State party's contention that the communication was inadmissible because of non-exhaustion of domestic remedies, and observed that the Judicial Committee of the Privy Council had dismissed the author's petition for special leave to appeal on two occasions, and that the Court of Appeal rejected the author's application to review his case on the ground that the evidence adduced was inadmissible. In the circumstances, the Committee found that there were no further effective remedies for the author to exhaust.

Review of the decision on admissibility

6.1 By further submission of 7 January 1991, the State party reiterates that the communication is inadmissible because of non-exhaustion of domestic remedies. In respect of the alleged violations of article 14, it submits that the author can file for constitutional redress under Section 25 of the Jamaican Constitution, for violations of his rights protected by Section 20.

6.2 In reply to the State party's submission, counsel submits that a constitutional motion in the Supreme Court of Jamaica would inevitably fail, in the light of the precedent set by the Judicial Committee of the Privy Council's decisions in DPP v. Nasralla [(1967) 2 AER 161] and Noel Riley et al. v. Attorney-General [(1982) 3 AER 469], where it was held that the Jamaican Constitution was intended to prevent the enactment of unjust laws and not merely unjust treatment under the law. Since the author alleges unfair treatment under the law, and not that post-constitutional laws are unconstitutional, the constitutional remedy is not available to him.

6.3 Besides, counsel submits, if the State party were correct in asserting that a constitutional remedy was indeed available, at least in theory, it would not

be available to the author in practice because of his lack of financial means and the unavailability of legal aid. Counsel affirms that it is extremely difficult to find a lawyer in Jamaica who is willing to represent applicants for purposes of a constitutional motion on a pro bono basis. Therefore, counsel concludes, it is the State party's inability or unwillingness to provide legal aid for such motions which absolved Mr. Smith from pursuing constitutional remedies.

7.1 The Committee has taken note of the State party's arguments on admissibility formulated after the Committee's decision declaring the communication admissible, especially in respect of the availability of constitutional remedies which the author may still pursue. It recalls that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed.

7.2 However, the Committee also recalls that by submission of 10 October 1991 concerning another case, c/ the State party indicated that legal aid is not provided for constitutional motions, and that it has no obligation under the Covenant to make legal aid available in respect of such motions, as they do not involve the determination of a criminal charge, as required under article 14, paragraph 3 (d), of the Covenant. In the view of the Committee, this supports the finding, made in the decision on admissibility, that a constitutional motion is not an available remedy for an author who has no means of his own to pursue it. In this context, the Committee observes that the author does not claim that he is absolved from pursuing constitutional remedies because of his indigence; rather it is the State party's unwillingness or inability to provide legal aid for the purpose that renders the remedy one that need not be pursued for purposes of the Optional Protocol. Accordingly, there is no reason to revise the decision on admissibility of 15 March 1990.

7.3 Furthermore, bearing in mind that the author was arrested in October 1980, convicted in January 1982, that his appeal was dismissed in October 1984 by the Court of Appeal and his petitions for special leave to appeal in 1987 by the Judicial Committee, and that furthermore the Court of Appeal of Jamaica rejected the author's application to review his case in December 1988, the Committee also finds that recourse to the Supreme (Constitutional) Court would entail an unreasonable prolongation of the application of domestic remedies which, together with the absence of legal aid, cannot be required of the author under article 5, paragraph 2 (b), of the Optional Protocol. There is, accordingly, no reason to reverse the decision on admissibility of 17 October 1989.

Examination of the merits

8. The State party contends that, as the author's claim of unfair trial is based on the contradictory nature of the evidence produced during the trial, it essentially raises issues of facts and evidence which the Committee is not competent to evaluate. In this connection, the State party refers to the Committee's jurisprudence.

9.1 Counsel submits that, prior to the trial, Mr. Smith had no opportunity to consult his legal representatives about the preparation of the defence. He only had a brief interview with his counsel, during a brief postponement on the first morning of the trial. It is submitted that the inadequate time the author had for the preparation of the defence amounts to a violation of article 14, paragraph 3 (b), of the Covenant.

9.2 Counsel further submits that, as a result of the author's inability to consult with his legal representatives, a number of key witnesses for the defence were not traced or called to the trial, constituting a violation of article 14, paragraph 3 (e), of the Covenant. Thus:

(a) According to Owen McGhie, the principal witness for the prosecution, five men were present at the time of the shooting. Of the four potential prosecution witnesses only Owen McGhie and one Junior James were called. Only Owen McGhie said that he saw the actual shot fired; Junior James gave circumstantial evidence. Neither Ephel Williams nor Merrick McGhie were called to give evidence at the trial; although both had made statements at the preliminary inquiry, L. B., the police officer in charge of the inquiry, denied at the trial that he had been able to contact either man. The affidavits of the two men indicate that, had they been available for examination and cross-examination at the trial, their evidence could have been crucial;

(b) Owen McGhie suggested that one F. was present at the locus in quo, and L. B. testified at the trial that F. had been arrested and charged in the case, but was subsequently acquitted. It is submitted that the defence had no opportunity to interview F., or to call him as a witness, due to lack of time for the preparation of the defence;

(c) The author maintained throughout his trial that, the day after the shooting, he went to the Spring Mount police station together with one F. W. in order to make a statement about what had happened. However, the officer on duty refused to take the statement, saying that he had already heard that he, Leaford Smith, had shot the deceased. He was then taken into custody. On 28 October 1980, he saw L. B. at the police station, giving the above-mentioned officer an order to transfer him to the Montego Bay police station. L. B., however, initially testified that he had first seen Mr. Smith, on 10 November 1980, at the Montego Bay police station, when the latter was charged with the murder of Errol McGhie; under cross-examination, L. B. later admitted that he had seen Mr. Smith some time earlier, at the Spring Mount police station. It is submitted that this important discrepancy was not effectively pursued by the defence at the trial. Furthermore, counsel submits that, due to the inadequate time available for the preparation of the defence, no investigations were carried out in respect of the author's claims, and that neither F. W. nor the officer involved was called to give evidence;

(d) The author further contended that F. was not present at the locus in quo; he claimed that Lloyd Smart was present and that he was detained but later released. Under cross-examination, Owen McGhie admitted that Lloyd Smart was detained in connection with the shooting; L. B., however, denied that he had ever been held. According to counsel, this was an important conflict of evidence, tending to cast further doubt on the honesty of L. B; yet the relevant police custody records were not checked by the defence due to inadequate time for the preparation of the case.

9.3 Counsel notes that the author was only tried 14 months after he was arrested. In particular, there was a delay of 10 months after the preliminary inquiry was closed; during this time, the author had no legal assistance, but since he was kept in police custody, he was unable to carry out his own investigations in order to prepare his defence.

9.4 Counsel further notes that it took another 32 months before the appeal was heard and dismissed, and that to date no written judgement has been issued by

the Court of Appeal. In this context, counsel submits a letter, dated 20 June 1986, from the Registrar of the Court of Appeal indicating that no written judgement was to be expected in the author's case. The failure of the Court of Appeal to issue a written judgement within a reasonable time is said to amount to a violation of article 14, paragraphs 3 (c) and 5, of the Covenant, as it deprived the author of an effective appeal to the Judicial Committee of the Privy Council. Counsel points out that under rule 4 of the Privy Council rules, a reasoned judgement of the Court of Appeal is required if the Judicial Committee is to entertain an appeal. As to the further appeal hearing on 5 December 1988, counsel affirms that the author's representative was assured that the Court of Appeal would put its reasons in writing at a later date, but that no such document has been produced some four years later. Thus, it is submitted, the author is again prevented from effectively petitioning the Judicial Committee of the Privy Council, contrary to article 14, paragraphs 3 (c) and 5.

9.5 Finally, with reference to the Committee's jurisprudence, counsel submits that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As there are no further remedies available to the author, and the final sentence of death was passed after a trial that did not meet the requirements of the Covenant, article 6 of the Covenant is said to be violated in the author's case.

10.1 As to the substance of Mr. Smith's allegations, the Committee notes with concern that the State party has confined itself to the observation that the facts relied upon by the author seek to raise issues of facts and evidence that the Committee is not competent to evaluate. The State party has not addressed any of the author's specific allegations concerning violations of fair trial guarantees. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate in good faith all the allegations of violations of the Covenant made against it and its judicial authorities, and to make available to the Committee all the information at its disposal. The Committee is of the opinion that the summary dismissal of the author's allegations, as in the present case, does not meet the requirements of article 4, paragraph 2. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

10.2 The Committee does not accept the State party's contention that the communication merely seeks to raise issues of facts and evidence. The communication raises other issues concerning the law and practice of Jamaica in regard to capital cases which require examination on the merits. The Committee reaffirms its jurisprudence that it is in principle for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case or to review specific instructions to the jury by the judge, unless it can be ascertained that the instructions to the jury or the judge's conduct of the trial are clearly arbitrary or amount to a denial of justice. Having reviewed the trial transcript, the Committee notes that the medical evidence strongly suggested that the deceased was shot from a very close range. This medical evidence was brought to the attention of the jury by the judge, and the jury chose not to take this evidence into account. The Committee therefore does not consider that the guarantees of a fair trial were violated in this regard.

10.3 In respect of the author's claim that the jury, or one of its members, was biased, the Committee notes that this issue has not been further substantiated and therefore does not reveal a violation of article 14 of the Covenant.

10.4 As to the author's claims that he was not allowed adequate time to prepare his defence and that, as a result, a number of key witnesses for the defence were not traced or called to give evidence, the Committee recalls its previous jurisprudence that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an emanation of the principle of equality of arms. d/ The determination of what constitutes "adequate time" requires an assessment of the circumstances of each case. In the instant case, it is uncontested that the trial defence was prepared on the first day of the trial. The material before the Committee reveals that one of the court-appointed lawyers requested another lawyer to replace him. Furthermore, another attorney assigned to represent the author withdrew the day prior to the trial; when the trial was about to begin at 10 a.m., the author's counsel asked for a postponement until 2 p.m., so as to enable him to secure professional assistance and to meet with his client, as he had not been allowed by the prison authorities to visit him late at night the day before. The Committee notes that the request was granted by the judge, who was intent on absorbing the backlog on the court's agenda. Thus, after the jury was empanelled, counsel had only four hours to seek an assistant and to communicate with the author, which he could only do in a perfunctory manner. This, in the Committee's opinion, is insufficient to prepare adequately the defence in a capital case. There is also, on the basis of the information available, the indication that this affected counsel's possibility of determining which witnesses to call. In the Committee's opinion, this constitutes a violation of article 14, paragraph 3 (b), of the Covenant.

10.5 It remains for the Committee to decide whether the failure of the Court of Appeal to issue a reasoned judgement violated any of the author's rights under the Covenant. Article 14, paragraph 5, of the Covenant guarantees the right of convicted persons to have the conviction and sentence reviewed "by a higher tribunal according to law". e/ For the effective exercise of this right, a convicted person must have the opportunity to obtain, within a reasonable time, access to duly reasoned judgements, for every available instance of appeal. The Committee observes that the Judicial Committee of the Privy Council dismissed the author's first petition for special leave to appeal because of the absence of a written judgement of the Jamaican Court of Appeal. It further observes that over four years after the dismissal of the author's appeal in September 1984 and his petitions for leave to appeal by the Judicial Committee in February and December 1987, no reasoned judgement had been issued, which once more deprived the author of the possibility to effectively petition the Judicial Committee. The Committee therefore finds that Mr. Smith's rights under article 14, paragraph 3 (c) and article 14, paragraph 5, of the Covenant, have been violated.

10.6 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, and which could no longer be remedied by appeal, constitutes a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the

presumption of innocence, the minimum guarantees for the defence, and the right to review [of conviction and sentence] by a higher tribunal". f/ In the instant case, since the final sentence of death was passed without having met the requirements for a fair trial set out in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee disclose violations of article 14, paragraphs 3 (b) and (c), the latter in conjunction with paragraph 5, and consequently of article 6 of the Covenant.

12. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The Committee is of the view that Mr. Leaford Smith, a victim of violations of article 14 and consequently of article 6, is entitled, according to article 2, paragraph 3 (a), of the Covenant to an effective remedy, in this case entailing his release.

13. The Committee would wish to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's views.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ Section 29, paragraph 1 (a), of the Judicature (Appellate Jurisdiction) Act, states: "The Governor-General ... may, if he thinks fit at any time, refer the whole case to the Court and the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted".

b/ The Court of Appeal allows fresh evidence to be adduced if the evidence is relevant, credible and was not available at the trial. It would appear that the Court of Appeal was not satisfied with the credibility of the affidavits of Ephel Williams and Merrick McGhie, as they contradicted their sworn testimony at the preliminary inquiry: Ms. Robinson's evidence would appear to have been excluded on the ground that she had not seen what actually transpired at the locus in quo. This is all hypothetical, however, as the Court of Appeal has not issued in writing its reasons for rejecting the new evidence, although the Court stated at the hearing that it would do so.

c/ Communication No. 283/1988 (Aston Little v. Jamaica), views adopted on 1 November 1991.

d/ See communications Nos. 253/1987 (Paul Kelly v. Jamaica), views adopted on 8 April 1991, para. 5.9; and 283/1988 (Aston Little v. Jamaica), views adopted on 1 November 1991, para. 8.3.

e/ See communication No. 230/1987 (R. Henry v. Jamaica), views adopted on 1 November 1991, para. 8.4.

f/ See CCPR/C/21/Rev.1, General Comment 6 [16], para. 7.

F. Communication No. 292/1988, Delroy Quelch v. Jamaica (views adopted on 23 October 1992, forty-sixth session)

Submitted by: Delroy Quelch (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of communication: 24 February 1988

Date of decision on admissibility: 15 March 1990

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 October 1992,

Having concluded its consideration of communication No. 292/1988, submitted to the Human Rights Committee on behalf of Delroy Quelch under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and by the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Delroy Quelch, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of a violation by Jamaica of articles 6, paragraphs 1, 7, and 14, paragraphs 1 and 3 (d), in conjunction with article 2, paragraph 3, of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 The author states that he was arrested on 10 July 1984 on suspicion of complicity in the murder of a police constable, V. W., on 3 July 1984. He and his co-defendants, Errol Reece and Robert Taylor, were tried at the Portland Circuit Court and sentenced to death on 21 June 1985. Their appeal was dismissed by the Court of Appeal of Jamaica on 15 December 1986. All three defendants subsequently petitioned the Judicial Committee of the Privy Council for special leave to appeal. By decision of 27 July 1989, the Privy Council quashed the decision of the Jamaican Court of Appeal with respect to the author's co-defendants, whereas it dismissed the author's appeal.

2.2 The author states that, on 3 July 1984, he was approached by a man, whom he knew as "Chappel", and five other individuals. He was asked by Chappel to escort them since he was more familiar with the area they were heading to. On the way, they stopped to buy drinks, and the author and Chappel were ordered to wait while the others headed towards Moore Town Post Office a few blocks away. Upon their return, a half hour later, the men were armed with rifles and ordered the author to lead them to Millbank District, where they assaulted the driver of a van parked at the roadside and drove off in the van to a nearby hill; there

the men became engaged in a shoot-out with three policemen in plain clothes, one of whom was fatally shot. The author states that the men then threatened to kill him if he informed the police about the incident. He further maintains that it was only later the same day that he learned that the Moore Town Post Office had been robbed.

2.3 After his arrest, the author was placed on an identification parade during which, he claims, a serious error was made in that the parade sheet indicated that he had been standing in the No. 1 position, and not No. 9, as the witness who identified him testified. This issue was raised during the trial. The author adds that the main prosecution witness, a policeman who survived the shooting, testified to having seen him twice at a gate, and then running close to the scene of the crime. He contends that the description of him given by this witness did not at all correspond to his appearance, in particular his beard and the style of his hair at the time in question.

2.4 He further submits that he was assigned an inexperienced lawyer, who, in addition, was constantly obstructed in his defence by the judge. He concedes that witnesses called to testify against him were cross-examined but claims that those whom he sought to have testify on his behalf were not called by his legal aid lawyer. With respect to his appeal, the author claims that his court-appointed lawyer did not appear at all for the hearing.

2.5 By submission of 30 November 1989, counsel argues that the central issue in this case relates to the treatment of identification evidence. He submits that the author's identification by the main prosecution witness depended entirely on "fleeting glance" and points out that the witness admitted this himself during cross-examination. Counsel further contends that the author was denied the right to adequate and effective legal assistance, both during trial and appeal; in particular, his representative allegedly failed to call witnesses to testify that the author's identification parade had not been properly conducted and to attest to the author's appearance at the time of the offence, in order to clarify the alleged discrepancies in the prosecution witness' evidence.

Complaint

3. The author claims that he has been denied a fair trial, in violation of article 14, paragraph 1, of the Covenant; that he has been denied the right to adequate and effective legal representation, in violation of article 14, paragraph 3 (d), of the Covenant; that his death sentence is disproportionate and constitutes cruel and inhuman punishment, in violation of article 7 of the Covenant; that the execution of his death sentence would constitute an arbitrary deprivation of his life, in violation of article 6 of the Covenant. He further claims that he has been denied the right to an effective domestic remedy, in violation of article 2, paragraph 3, of the Covenant.

State party's observations and the author's comments thereon

4. By submission, dated 28 September 1989, the State party contends that, in spite of the dismissal of the author's petition by the Judicial Committee of the Privy Council, the communication is inadmissible for failure to exhaust domestic remedies, since the author has not pursued the remedies available to him under the Jamaican Constitution. In this context, the State party submits that the provisions of the Covenant invoked by the author (arts. 6, 7, and 14) are coterminous with the rights protected by sections 14, 17 and 20 of the Jamaican Constitution, which guarantee to everyone the right to life, protection against

torture, inhuman or degrading punishment or treatment, and due process of law, respectively. Under the Constitution, if anyone alleges that any of these fundamental rights has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter which is lawfully available, apply to the Supreme Court for redress.

5. In his comments on the State party's submission, counsel challenges the State party's contention that the author may still pursue constitutional remedies and submits that these remedies are not available to the author owing to lack of financial means and unavailability of legal aid for the purpose, despite the guarantees of section 25 (1) of the Jamaican Constitution.

Committee's considerations and decision on admissibility

6.1 During its thirty-eighth session, in March 1990, the Committee considered the admissibility of the communication. It observed that recourse to the Constitutional Court under section 25 of the Jamaican Constitution was not a remedy available to the author within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

6.2 In respect of the author's contention that the judge failed to direct the jury adequately on the issue of identification evidence in the case, the Committee considered that, while article 14 of the Covenant guarantees the right to a fair trial, it is in principle for the appellate courts of States parties to the Covenant, and not for the Committee, to evaluate facts and evidence in a particular case and to review specific instructions to the jury. It found therefore that this part of the communication was inadmissible under article 3 of the Optional Protocol.

6.3 The Committee further considered that the author's claim that he suffered inhuman and degrading treatment in violation of article 7 of the Covenant had not been substantiated, for purposes of admissibility.

6.4 The Human Rights Committee, therefore, declared the communication admissible in so far as it might raise issues under article 14, paragraph 3 (d), of the Covenant, in respect of the claim that no lawyer was present during the author's appeal.

Review of admissibility

7. The State party, by submission of 6 February 1991, maintains that the communication is inadmissible because of the author's failure to file a constitutional motion.

8.1 The Committee has taken note of the State party's argument that constitutional remedies are still available to the author. It recalls that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed.

8.2 However, the Committee also recalls that by submission of 10 October 1991 concerning another case, a/ the State party indicated that legal aid is not provided for constitutional motions, and that it has no obligation under the Covenant to make legal aid available in respect of such motions, as they do not involve the determination of a criminal charge, as required under article 14, paragraph 3 (d), of the Covenant. In the view of the Committee, this supports

the finding, made in the decision on admissibility, that a constitutional motion is not an available remedy for an author who has no means of his own to pursue it. In this context, the Committee observes that the author does not claim that he is absolved from pursuing constitutional remedies because of his indigence; rather it is the State party's unwillingness or inability to provide legal aid for the purpose that renders the remedy one that need not be pursued for purposes of the Optional Protocol.

8.3 The Committee further notes that the author was arrested in 1984, tried and convicted in 1985, and that his appeals were dismissed in December 1986 by the Court of Appeal of Jamaica and in July 1989 by the Judicial Committee of the Privy Council. The Committee deems that for purposes of article 5, paragraph 2 (b), of the Optional Protocol, the pursuit of constitutional remedies would, in the circumstances of the case, entail an unreasonable prolongation of the application of domestic remedies. Accordingly, there is no reason to revise the decision on admissibility of 15 March 1990.

Examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes with concern that the State party in its submissions has confined itself to issues of admissibility. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate in good faith all the allegations made against it, and to make available to the Committee all the information at its disposal. The Committee observes that the State party's failure to meet the requirements of article 4, paragraph 2, of the Optional Protocol renders the examination of the instant communication unduly difficult.

9.3 With regard to the author's claim that he was not represented during the appeal proceedings, the Committee notes that the written judgement of the Court of Appeal shows that counsel for the author was present during the appeal hearing, and argued that the evidence against the author, based solely on identification by one eye-witness and the author's own statement to the police, was not sufficient. Accordingly, the Committee, in this respect, finds no violation of article 14, paragraph 3 (d), of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 14 of the International Covenant on Civil and Political Rights.

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ Communication No. 283/1988 (Aston Little v. Jamaica), views adopted on 1 November 1991.

G. Communication No. 307/1988, John Campbell v. Jamaica (views adopted on 24 March 1993, forty-seventh session)**

Submitted by: John Campbell

Alleged victim: The author

State party: Jamaica

Date of communication: 20 June 1988

Date of decision on admissibility: 21 March 1991

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 March 1993,

Having concluded its consideration of communication No. 307/1988, submitted to the Human Rights Committee by John Campbell under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.*

1. The author of the communication (dated 20 June 1988) is John Campbell, a Jamaican citizen at the time of submission awaiting execution at St. Catherine District Prison, Jamaica. He claims that his rights under the International Covenant on Civil and Political Rights have been violated by Jamaica, without specifying which provisions of the Covenant he considers to have been violated.

Facts as submitted

2.1 The author states that after a marital argument on 2 December 1980, both he and his wife sustained burns. The wife was hospitalized and the author taken into custody, although the wife had not accused him of intentionally hurting her. On 3 December 1980, the investigating officer formally charged him with assault. On 13 December 1980, his wife died of pneumonia in the hospital.

2.2 Subsequently, the author was charged with murder, although, according to him, his wife had consistently refused to accuse him of injuring her

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* An individual opinion submitted by Mr. Bertil Wennergren is appended.

** Pursuant to rule 85 of the Committee's rules of procedure, Committee member Mr. Laurel Francis did not take part in the adoption of the Committee's views.

intentionally. This was apparently corroborated by the investigating officer in his testimony before the Circuit Court. At the preliminary inquiry, the author's 10-year-old son, Wayne, accused his father of having intentionally injured the mother. The eldest son, Ralston, testified that he was asleep when the event occurred. Both statements, according to the author, were false.

2.3 In June 1983 the author went on trial before the Circuit Court of Kingston. The legal aid attorney assigned to the case allegedly made a number of serious errors which contributed to the author's conviction. At the start of the trial, the author's son, Wayne, allegedly told the court that he did not see his father do anything and had no questions to answer. Since Wayne did not alter this statement after several searching questions from both the prosecutor and the judge, the judge allegedly threatened him with detention if he refused to answer. At the end of the first day of the trial, the author's son was in fact brought to the police headquarters and detained overnight. Upon resumption of the trial the next morning, the judge and the prosecutor resumed their questioning of the son; the latter, however, still refused to answer, and as a consequence, the judge adjourned. Upon resumption of the trial, the same scenario repeated itself, and Wayne allegedly broke down and testified against his father. The Circuit Court found the author guilty as charged and sentenced him to death. On 11 June 1985, the Court of Appeal dismissed his appeal.

2.4 Shortly after the rejection of the appeal, a representative of the Jamaica Council for Human Rights informed the author that Wayne had made a written statement revoking his testimony during the trial. Wayne stated that, on 2 December 1980, his father came home drunk and that a quarrel ensued between him and his mother. Apparently, in the course of the altercation, the deceased doused herself with kerosene oil and set herself ablaze with a match, given to her by the author. The author then ran out of the house, and his wife jumped into a cistern of water adjoining the house, in an attempt to seek relief from the burns sustained. She was taken to the hospital, where she died of pneumonia, 10 days later. In his written statement Wayne explains that he had previously made a statement to the effect that his father had poured the kerosene on his mother and set it alight, because he had blamed his father for his mother's death. Moreover, Wayne claims that he had been intimidated by the judge's attitude towards him during the trial, when he tried to alter his previous statement. In this context, he states: "I thought that if I changed the statement I would be sent to prison. This was when I gave evidence against Dad."

Complaint

3.1 The author claims that he was denied a fair trial, and that irregularities occurred throughout the judicial proceedings in his case. In particular, he submits that his legal representation was inadequate. During the preliminary investigation, his legal aid lawyer tried to persuade him to enter a plea of manslaughter, which the prosecution allegedly was willing to accept. The author refused and asked the court to assign another lawyer to the case; his request was granted. During the trial, his lawyer allegedly did not question the judge why he refused to accept Wayne's testimony that he had not witnessed the incident, why he had to enter a second plea, why Wayne had been remanded in custody for one day, and why he also had to take the oath a second time. The lawyer allegedly disregarded his complaints concerning the conduct of the trial. According to the author, the lawyer, when cross-examining Wayne, did not pose the appropriate questions and did not take up the opportunity afforded him by the judge, who asked if he had anything to say after the jury had returned

without a verdict and with a request for more information. The author further claims that his lawyer should have objected when the judge prevented the author from continuing his testimony. No witnesses were sought to testify on the author's behalf.

3.2 With respect to the circumstances of the appeal, the author states that although he was informed that a legal aid lawyer had been assigned to him for the purpose, he only learned of his name after the appeal had been dismissed. He claims that he does not know whether he was in fact represented by his attorney during the hearing of the appeal. All his written requests for clarifications to his attorney went unanswered.

3.3 With regard to the requirement of exhaustion of domestic remedies, the author claims that he has unsuccessfully requested assistance from the Jamaica Council for Human Rights to file a petition for special leave to appeal to the Judicial Committee of the Privy Council. He further indicates that, in spite of numerous requests addressed to the lawyer who represented him before the Circuit Court and to the Jamaica Council for Human Rights, he has not succeeded in obtaining the written judgements in his case. On 4 December 1990, the Secretariat requested the author to indicate whether a written judgement in the case had been issued by the Court of Appeal, and whether he had taken any further steps to petition the Judicial Committee of the Privy Council. In his reply, the author confirms that in spite of numerous requests to the Registrar of the Supreme Court for the written judgements, including the judgement of the Court of Appeal, he has still not been able to obtain them.

State party's observations

4. In its only submission, the State party contended that the communication was inadmissible on the ground of non-exhaustion of domestic remedies, since the author could still petition the Judicial Committee of the Privy Council for special leave to appeal, pursuant to section 110 of the Jamaican Constitution.

Committee's decision on admissibility

5.1 During its forty-first session the Committee considered the admissibility of the communication. It considered that the author's failure to petition the Judicial Committee of the Privy Council could not be attributed to him, since the relevant court documents had not been made available to him, thereby frustrating his attempts to have his case entertained by the Judicial Committee.

5.2 Inasmuch as the author's claims related to the review and the evaluation of evidence, the communication was declared inadmissible under article 3 of the Optional Protocol. The Committee, however, considered that the author's allegations that his son was detained in order to force him to testify against him and that he was unrepresented during the hearing of his appeal should be considered on the merits. Accordingly, the Committee declared the communication admissible inasmuch as it might raise issues under article 14, paragraphs 1 and 3 (d) of the Covenant.

Examination of the merits

6.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol. The Committee regrets the absence of cooperation by the State party regarding the substance of the matter under

consideration. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate in good faith all the allegations of violations of the Covenant made against it and to make available to the Committee all the information at its disposal. In the absence of any State party submission on the merits of the case, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.2 In respect of the author's claim that he was not properly represented during the hearing of his appeal, the Committee notes with concern that the author was not notified of the name of his court-appointed lawyer until after the appeal was dismissed. This effectively prevented the author from consulting with his lawyer and from giving him instructions in preparation of the appeal. In the circumstances the Committee finds a violation of article 14, paragraph 3 (d), of the Covenant.

6.3 As regards the author's claim that his son Wayne was detained in order to force him to testify against him, the Committee observes that this is a grave allegation, which the author has endeavoured to substantiate, and which is corroborated by his son's statement. In the absence of any information from the State party, the Committee bases its decision on the facts as provided by the author.

6.4 Article 14 of the Covenant gives everyone the right to a fair and public hearing in the determination of a criminal charge against him; an indispensable aspect of the fair trial principle is the equality of arms between the prosecution and the defence. The Committee observes that the detention of witnesses in view of obtaining their testimony is an exceptional measure, which must be regulated by strict criteria in law and in practice. It is not apparent from the information before the Committee that special circumstances existed to justify the detention of the author's minor child. Moreover, in the light of his retraction, serious questions arise about possible intimidation and about the reliability of the testimony obtained under these circumstances. The Committee therefore concludes that the author's right to a fair trial was violated.

6.5 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review [of conviction and sentence] by a higher tribunal". a/ In the present case, since the final sentence of death was passed without having met the requirements for a fair trial set out in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 6 and 14, paragraphs 1 and 3 (d), of the International Covenant on Civil and Political Rights.

8. The Committee is of the view that Mr. John Campbell is entitled to an appropriate remedy. In this case, as the Committee finds that Mr. Campbell did not receive a fair trial, the Committee considers that the appropriate remedy entails release. The State party is under an obligation to ensure that similar violations do not occur in the future.

9. The Committee wishes to receive information, within 90 days, from the State party in respect of the Committee's views.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ See CCPR/C/21/Rev.1, General Comment 6 [16], para. 7.

Appendix

Individual opinion submitted by Mr. Bertil Wennergren, pursuant to rule 94, paragraph 3, of the Committee's rules of procedure concerning the Committee's views on communication No. 307/1988, John Campbell v. Jamaica

I concur with the Committee's findings. However, my reasons for finding a violation of the author's right to a fair trial differ from those explained by the Committee in paragraph 6.4 of the views.

Article 14, paragraph 1, of the Covenant entitles everyone to a fair and public hearing by a competent, independent and impartial tribunal established by law. Paragraph 3 of the same article contains further guarantees for those charged with a criminal offence. In the present context, one may recall article 14, paragraph 3 (e), which guarantees that an accused shall have the right, in full equality, to examine or have examined, the witnesses against him and to obtain the attendance and the examination of witnesses on his behalf under the same conditions as witnesses against him. In my opinion, however, the issue in this case is not whether the principle of equality of arms was violated with respect to hearing the author's son Wayne as a witness, but whether his examination was compatible with the principles of due process of law and fair trial. It must be recalled first that, when Wayne was heard as a witness by the court, he was merely 13 years of age, and he was expected to truthfully recount an event which had occurred nearly three years earlier, when he was 10, and which might seriously incriminate his father. Secondly, measures of coercion were employed against him to make him testify and otherwise comply with his obligations as a witness.

Although most legal systems provide for the possibility of hearing children as witnesses in court, it is generally understood that particular care must be exercised in view of the vulnerability of children. Measures must be taken to ensure that a child is stable and mature enough to withstand the pressures and the stress that witnesses in a criminal case may encounter. If a hearing is considered necessary and may be carried out without risk for the child's well-being, every effort must be made to conduct the hearing in as considerate and sympathetic a way as possible. In the same context, it should be recalled that article 24 of the Covenant entitles every child to such measures of protection as are required by his status as a minor.

There is ample reason to believe that when Wayne testified in court, he had acquired a degree of maturity that calling him as a witness was as such permissible. However, an aggravating factor was that he was the accused's son and, moreover, the only person whom the prosecution could adduce as witness to prove the guilt of Mr. Campbell. Some legal systems exempt individuals from the obligation to testify against close relatives, the rationale being that an obligation to testify would be inhuman and thus unacceptable. Due to the lack of a generally recognized principle in this respect, however, I cannot rule out as inadmissible the hearing of Wayne as a witness simply because he was the son of the accused.

The case file contains a letter written by Wayne, in which he states that he was the "crown evidence" and gave a statement against his father in court. At that time, he was 10 years old. He was frightened and believed that his father was the cause of everything, and he was upset with him then. In respect

of the trial, he mentions in his letter that he told the court that it had been his father who had thrown the oil on his mother and lit the matches; at that point, he stopped talking, and the judge ordered him taken into custody. He spent one night in the central police lock-up. Scared, he planned on changing his statement, but the judge scared him even further. He thought that if he changed his statement, he would be sent to prison; this is when he "gave evidence against Dad".

Testimony in a court of law is civic duty and all legal systems provide for . rtain coercive measures to guarantee compliance with that duty. Subpoena and imprisonment are the most common coercive measures and should be used for the equal benefit of the prosecution and the defence, whenever deemed necessary for the presentation of evidence to the jury which, on the basis of such evidence, must determine guilt or innocence of the accused. In its views, the Committee observes that the detention of witnesses is an exceptional measure, which must be regulated by strict criteria in practice and in law, and that it is not apparent that special circumstances existed in the author's case to justify the detention of a 13-year old. For me, it is difficult to imagine circumstances that would justify a child's detention in order to compel him to testify against his father. In any event, this case in no way discloses such special circumstances; the judge therefore must be deemed to have violated the principle of due process of law, and the requirements of a fair hearing under article 14, paragraph 1. The violation was in fact the violation of the rights of a witness, but its negative impact on the conduct of the trial was such that it rendered it unfair within the meaning of article 14, paragraph 1, of the Covenant.

H. Communication No. 309/1988, Carlos Orihuela Valenzuela v. Peru (views adopted on 14 July 1993, forty-eighth session)

Submitted by: Carlos Orihuela Valenzuela

Alleged victims: The author and his family

State party: Peru

Date of communication: 29 June 1988

Date of decision on admissibility: 22 March 1991

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 July 1993,

Having concluded its consideration of communication No. 309/1988, submitted to the Human Rights Committee by Mr. Carlos Orihuela Valenzuela under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and noting with serious concern that no information on the merits of the case has been received from the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication dated 29 June 1988 is Carlos Orihuela Valenzuela, a Peruvian citizen residing at Lima, Peru. He claims to be a victim of a violation by the Government of Peru of his human rights but does not invoke any articles of the International Covenant on Civil and Political Rights.

Facts as submitted

2.1 The author, a member of the Peruvian bar (Colegio de Abogados) and a civil servant for 26 years, was named counsel for the Chamber of Deputies in 1982 and served in the Peruvian Human Rights Commission for five years. Following the change of government in Peru in 1985, he was dismissed from his post at the Chamber of Deputies without any administrative proceedings. The author states that he has six school-age children and that he is not receiving the civil servant's pension to which he claimed to be entitled.

2.2 With regard to the requirement of exhaustion of domestic remedies, the author states that he has unsuccessfully tried all administrative and judicial remedies. He alleges that the proceedings have been frustrated for political reasons and have been unduly prolonged. On 7 November 1985 he petitioned for the reconsideration of his dismissal (recurso de reconsideración) but he alleges that, on the express order of a senior deputy, his petition was not processed. On 10 April 1986, he renewed his request by way of a complaint (queja), which was similarly not processed by the authorities. On 8 May 1986, he lodged an action (denuncia) before the President of the Chamber of Deputies, again without any response. On 11 June 1986, he addressed a request to the Chamber of Deputies based on Law 24514 and Legislative Decree No. 276, again without any

response. On 23 June 1986, he presented an appeal (recurso de apelación) to the President of the Chamber of Deputies, which was similarly ignored.

2.3 On 2 July 1986, he had recourse to the Civil Service Tribunal (Tribunal del Servicio Civil en Apelación), but three months later the Chamber of Deputies addressed a memorandum to the Tribunal ordering it to respect its resolution dismissing the author, invoking article 177 of the Peruvian Constitution. This last administrative instance allegedly complied with the order of the Chamber of Deputies and terminated its investigation of the case.

2.4 On 5 September 1986, the author filed an action for reinstatement in the civil service with a court of first instance in Lima, which, on 23 July 1987, decided against him. On appeal, the matter was taken up by the Superior Court of Lima (Segunda Sala Civil de la Corte Superior de Lima), which, on 21 March 1988, requested the Civil Service Tribunal to forward the author's dossier. The Civil Service Tribunal did not comply with the request of the Superior Court and, by order of 29 December 1988, the Superior Court dismissed the appeal.

2.5 An action against the Chamber of Deputies concerning the author's rights to severance pay (pensíon de cesantía) has been pending before the Supreme Court (Segunda Sala de la Corte Suprema) since 1 February 1989. In October 1989 the competent organ of the Chamber of Deputies resolved to grant him severance pay corresponding to his 26 years of civil service. The President of the Chamber, however, never signed the resolution and to this date no pension has been paid.

2.6 He further alleges that members of his family have been subjected to ill-treatment and humiliation, in particular that in 1989 his 22-year-old son Carlos was arbitrarily detained by the police and subjected to beatings, that he was given a shower in his clothes at the Lince police station, as a consequence of which he became ill and had to be hospitalized in the bronchio-pulmonary section of a clinic and that his other son Lorenzo was subjected to arbitrary arrest and detention on two occasions; moreover, that as part of the general harassment against the Orihuela family, his son Carlos has been barred from participating in the entrance examinations to the university. He has denounced these abuses to the competent prosecuting authorities (Fiscalía Penal de Turno), without redress.

Complaint and relief sought

3. The author alleges that he and his family have been subjected to defamation and discrimination because of their political opposition to the Government of the then President Alan García of the American Popular Revolutionary Alliance party, and that all attempts to obtain redress have been met by a politically motivated denial of justice. In particular, he claims that his sons have been subjected to arbitrary arrest and ill-treatment, and that he was unjustly dismissed from the civil service and denied a fair hearing in the courts, that he is being debarred from reinstatement in any post in the civil service, that he received no severance pay upon dismissal after 26 years of service, and that his honour and reputation have been unjustly attacked. He seeks, inter alia, reinstatement in his post and compensation for the unjust dismissal.

Admissibility considerations

4.1 On 21 November 1988, the State party was requested to furnish information on the question of admissibility of the communication, including details of

effective domestic remedies. The State party was also requested to furnish the Committee with copies of all relevant administrative and judicial orders and decisions in the case, in so far as they had not already been submitted by the author, and to inform the Committee of the status of the action pending before the Superior Court of Lima (Segunda Sala de la Corte Superior de Lima). No submission from the State party on the question of admissibility was received, in spite of a reminder sent on 14 August 1989.

4.2 During its forty-first session, the Committee considered the admissibility of the communication. It ascertained, as it is required to do under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement. With regard to article 5, paragraph 2 (b), of the Optional Protocol, the Committee was unable to conclude, on the basis of the information before it, that there were effective remedies available to the author which he could or should have pursued. Moreover, the application of existing remedies had been unreasonably prolonged within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

4.3 With regard to the author's allegations relating to an arbitrary denial of redress for the dismissal from his post as counsel for the Chamber of Deputies, as well as his claim to have been subjected to unfair judicial proceedings and judicial bias, the Committee found that these allegations had not been substantiated, for purposes of admissibility.

4.4 The Committee found that the author's other allegations, in particular those related to the arbitrary denial of severance pay as well as those related to the harassment of his family, notably his two sons, had been substantiated, for purposes of admissibility, and should be considered on the merits.

5. On 22 March 1991, the Human Rights Committee declared the communication admissible inasmuch as it might raise issues under articles 10, 17 and 26 of the Covenant. The Committee again requested the State party to forward copies of any relevant orders or decisions in the author's case, and to clarify the relationship between the Chamber of Deputies and the Civil Service Tribunal and other courts.

Examination of the merits

6.1 In spite of reminders sent to the State party on 9 January and 26 August 1992, only a submission concerning domestic remedies was received, but no submission on the merits of the case. The Committee notes with concern the lack of any cooperation on the part of the State party in respect of the substance of the author's allegations. It is implicit in article 4, paragraph 2, of the Optional Protocol that a State party to the Covenant must investigate in good faith all the allegations of violations of the Covenant made against it and its authorities, and furnish the Committee with detailed information about the measures, if any, taken to remedy the situation. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.2 As to the alleged violation of article 10, paragraph 1, of the Covenant, in respect of the author's children, the Committee notes that the material before it indicates that the author's two adult sons have been subjected to ill-treatment during detention, including beatings. The author's adult sons,

however, are not co-authors of the present communication and therefore the Committee makes no finding in regard to a violation of their rights.

6.3 The Committee notes that these allegations of ill-treatment against members of the author's family have not been contested by the State party. However, the author's allegations do not provide sufficient substantiation so as to justify a finding of a violation of article 17 of the Covenant.

6.4 The Committee has noted the author's claim that he has not been treated equally before the Peruvian courts in connection with his pension claims. The State party has not refuted his allegation that the courts' inaction, the delays in the proceedings and the continued failure to implement the resolution of October 1989 concerning his severance pay are politically motivated. The Committee concludes, on the basis of the material before it, that the denial of severance pay to a long-standing civil servant who is dismissed by the Government constitutes, in the circumstances of this case, a violation of article 26 and that Mr. Orihuela Valenzuela did not benefit "without any discrimination [from] equal protection of the law". Therefore, the Committee finds that there has been a violation of article 26 of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 26 of the Covenant.

8. The Committee is of the view that Mr. Carlos Orihuela Valenzuela is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy, including a fair and non-discriminatory examination of his claims, appropriate compensation and such severance pay as he would be entitled to under Peruvian law. The State party is under an obligation to take measures to ensure that similar violations do not occur in the future.

9. The Committee would wish to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's views.

[Done in English, French and Spanish, the English text being the original version.]

I. Communication No. 314/1988, Peter Chiiko Bwalya v. Zambia
(views adopted on 14 July 1993, forty-eighth session)

Submitted by: Peter Chiiko Bwalya

Victim: The author

State party: Zambia

Date of communication: 30 March 1988 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 July 1993,

Having concluded its consideration of communication No. 314/1988, submitted to the Human Rights Committee by Mr. Peter Chiiko Bwalya under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Peter Chiiko Bwalya, a Zambian citizen born in 1961 and currently chairman of the People's Redemption Organization, a political party in Zambia. He claims to be a victim of violations of the International Covenant on Civil and Political Rights by Zambia.

Facts as submitted

2.1 In 1983, at the age of 22, the author ran for a parliamentary seat in the Constituency of Chifubu, Zambia. He states that the authorities prevented him from properly preparing his candidacy and from participating in the electoral campaign. The authorities' action apparently helped to increase his popularity among the poorer strata of the local population, as the author was committed to changing the Government's policy towards, in particular, the homeless and the unemployed. He claims that in retaliation for the propagation of his opinions and his activism, the authorities subjected him to threats and intimidation, and that in January 1986 he was dismissed from his employment. The Ndola City Council subsequently expelled him and his family from their home, while the payment of his father's pension was suspended indefinitely.

2.2 Because of the harassment and hardship to which he and his family were being subjected, the author emigrated to Namibia, where other Zambian citizens had settled. Upon his return to Zambia, however, he was arrested and placed in custody; the author's account in this respect is unclear and the date of his return to Zambia remains unspecified.

2.3 The author notes that by September 1988 he had been detained for 31 months, on charges of belonging to the People's Redemption Organization - an association considered illegal under the terms of the country's one-party Constitution - and for having conspired to overthrow the Government of the then President Kenneth Kaunda. On an unspecified subsequent date, he was released; again, the

circumstances of his release remain unknown. At an unspecified later date, Mr. Bwalya returned to Zambia.

2.4 On 25 March 1990, the author sought the Committee's direct intercession in connection with alleged discrimination, denial of employment and refusal of a passport. By letter of 5 July 1990, the author's wife indicated that her husband had been rearrested on 1 July 1990 and taken to the Central Police Station in Ndola, where he was reportedly kept for two days. Subsequently, he was transferred to Kansenshi prison in Ndola; the author's wife claims that she was not informed of the reasons for her husband's arrest and detention.

2.5 With respect to the requirement of exhaustion of domestic remedies, the author notes that he instituted proceedings against the authorities after his initial arrest. He notes that the district tribunal reviewing his case confirmed, on 17 August 1987, that he was no danger to national security but that, notwithstanding the court's finding, he remained in custody. A further approach to the Supreme Court met with no success.

Complaint

3.1 In his initial submissions, the author invokes a large number of provisions of the Covenant, without substantiating his allegations. In subsequent letters, he confines his claims to alleged violations of articles 1, 2, 3, 9, 10, 12, 25 and 26 of the Covenant.

3.2 The author contends that, since he never participated in any conspiracy to overthrow the Government of President Kaunda, his arrests were arbitrary and his detentions unlawful, and that he is entitled to adequate compensation from the State party. He submits that following his release from the first period of detention he continued to be harassed and intimidated by the authorities; he claims that he denounced these practices.

3.3 The author states that, as a political activist and former prisoner of conscience, he has been placed under strict surveillance by the authorities, and that he continues to be subjected to restrictions on his freedom of movement. He claims that he has been denied a passport as well as any means of making a decent living.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 During its forty-first session, the Committee considered the admissibility of the communication. It noted with concern the absence of cooperation from the State party which, in spite of four reminders addressed to it, had failed to comment on the admissibility of the communication. It further noted that the author's claim that the Supreme Court had dismissed his appeal had remained uncontested. In the circumstances, the Committee concluded that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

4.3 As to the claims relating to articles 7 and 10 of the Covenant, the Committee considered that the author had failed to substantiate his claim, for

purposes of admissibility, that he had been subjected to treatment in violation of these provisions. Accordingly, the Committee found this part of the communication inadmissible under article 2 of the Optional Protocol.

4.4 With respect to the author's claims that he: (a) had been subjected to arbitrary arrest and unlawful detention; (b) had been denied the right to liberty of movement and arbitrarily denied a passport; (c) had been denied the right to take part in the conduct of public affairs; and (d) had been discriminated against on account of political opinion, the Committee considered that they had been substantiated, for purposes of admissibility. Furthermore, the Committee was of the opinion that, although articles 9, paragraph 2, and 19 had not been invoked, the facts as submitted might raise issues under these provisions.

4.5 On 21 March 1991, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 9, 12, 19, 25 and 26 of the Covenant.

5.1 In a submission dated 28 January 1992, the State party indicates that "Mr. Peter Chiiko Bwalya has been released from custody and is a free person now". No information on the substance of the author's allegations, nor copies of his indictment or any judicial orders concerning the author, have been provided by the State party, in spite of reminders addressed to it on 9 January and 21 May 1992.

5.2 In a letter dated 3 March 1992, the author confirms that he was released from detention but requests the Committee to continue consideration of his case. He adds that the change in the Government has not changed the authorities' attitude towards him.

6.1 The Committee has considered the communication in the light of all the information provided by the parties. It notes with concern that, with the exception of a brief note informing the Committee of the author's release, the State party has failed to cooperate on the matter under consideration. It further recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal, including all available judicial orders and decisions. The State party has not forwarded to the Committee any such information. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.2 In respect of issues under article 19, the Committee considers that the uncontested response of the authorities to the attempts of the author to express his opinions freely and to disseminate the political tenets of his party constitute a violation of his rights under article 19.

6.3 The Committee has noted that when the communication was placed before it for consideration, Mr. Bwalya had been detained for a total of 31 months, a claim that has not been contested by the State party. It notes that the author was held solely on charges of belonging to a political party considered illegal under the country's (then) one-party constitution and that on the basis of the information before the Committee, Mr. Bwalya was not brought promptly before a judge or other officer authorized by law to exercise judicial power to determine the lawfulness of his detention. This, in the Committee's opinion, constitutes a violation of the author's right under article 9, paragraph 3, of the Covenant.

6.4 With regard to the right to security of person, the Committee notes that Mr. Bwalya, after being released from detention, has been subjected to continued harassment and intimidation. The State party has not contested these allegations. The first sentence of article 9, paragraph 1, guarantees to everyone the right to liberty and security of person. The Committee has already had the opportunity to explain that this right may be invoked not only in the context of arrest and detention, and that an interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render ineffective the guarantees of the Covenant. a/ In the circumstances of the case, the Committee concludes that the State party has violated Mr. Bwalya's right to security of person under article 9, paragraph 1.

6.5 The author has claimed, and the State party has not denied, that he continues to suffer restrictions on his freedom of movement, and that the authorities have refused to issue a passport to him. This, in the Committee's opinion, amounts to a violation of article 12, paragraph 1, of the Covenant.

6.6 As to the alleged violation of article 25 of the Covenant, the Committee notes that the author, a leading figure of a political party in opposition to the former President, has been prevented from participating in a general election campaign as well as from preparing his candidacy for this party. This amounts to an unreasonable restriction on the author's right to "take part in the conduct of public affairs" which the State party has failed to explain or justify. In particular, it has failed to explain the requisite conditions for participation in the elections. Accordingly, it must be assumed that Mr. Bwalya was detained and denied the right to run for a parliamentary seat in the Constituency of Chifubu merely on account of his membership in a political party other than that officially recognized; in this context, the Committee observes that restrictions on political activity outside the only recognized political party amount to an unreasonable restriction of the right to participate in the conduct of public affairs.

6.7 Finally, on the basis of the information before it, the Committee concludes that the author has been discriminated against in his employment because of his political opinions, contrary to article 26 of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee disclose violations of articles 9, paragraphs 1 and 3, 12, 19, paragraph 1, 25 (a) and 26 of the Covenant.

8. Pursuant to article 2 of the Covenant, the State party is under an obligation to provide Mr. Bwalya with an appropriate remedy. The Committee urges the State party to grant appropriate compensation to the author. The State party is under an obligation to ensure that similar violations do not occur in the future.

9. The Committee would wish to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's views.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ Views on communication No. 195/1985 (Delgado Páez v. Colombia), adopted on 12 July 1990, paras. 5.5 and 5.6.

J. Communication No. 317/1988, Howard Martin v. Jamaica
(views adopted on 24 March 1993, forty-seventh session)*

Submitted by: Howard Martin (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of communication: 5 August 1988

Date of decision on admissibility: 15 March 1990

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 March 1993,

Having concluded its consideration of communication No. 317/1988, submitted to the Human Rights Committee on behalf of Mr. Howard Martin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication (initial submission dated 5 August 1988 and subsequent correspondence) is Howard Martin, a Jamaican citizen currently awaiting executing at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation of articles 6, 7, 10 and 14 of the International Covenant on Civil and Political Rights by Jamaica. He is represented by counsel.

Facts as submitted

2.1 The author states that he was sentenced to death on 17 February 1981 in the Home Circuit Court of Kingston for the murder, on 22 September 1979, of one Rupert Wisdom. The Jamaican Court of Appeal dismissed his appeal on 11 November 1981. In February 1988, a warrant for his execution was issued. After 17 days, however, he was granted a last minute stay, because a petition for special leave to appeal to the Judicial Committee of the Privy Council was being prepared on his behalf. On 11 July 1988, the author's petition for special leave to appeal was dismissed by the Judicial Committee of the Privy Council. The Judicial Committee of the Privy Council did, however, express grave concern about the delays in the case, and stated "... that attention should be given to devising procedures which will eliminate distressful delays of this character".

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* Pursuant to rule 85 of the Committee's rules of procedure, Committee member Mr. Laurel Francis did not take part in the adoption of the Committee's views.

2.2 As to the facts, the author states that on the evening of 22 September 1979, he had been engaged in a heated discussion with a female acquaintance outside the gate of her home. Mr. Wisdom, who lived at the same premises, approached them, told the author to leave and allegedly struck him on the forehead with a bottle. The author then grabbed a piece of steel lying on the ground and turned to the alleged attacker, who had been following him. In the fight that ensued, Mr. Wisdom was fatally injured.

2.3 As to the trial proceedings, the author submits that during the preliminary inquiry, the evidence given by two eye-witnesses was contradictory. Only one of them testified during the trial, and the author alleges that her evidence was at odds with her previous statement. When the author's representative questioned her, he was interrupted by the trial judge, who ruled out further cross-examination on the matter. The author further submits that this witness was a close friend of the police officer in charge of the investigations of his case and that she was accompanied by this police officer to the court each day.

Complaint

3.1 The author claims that his trial was unfair, and that the trial judge erred in not directing the jury on the issue of involuntary manslaughter. He argues that it was clear from the evidence in the case that it was more than doubtful whether he had any intent to kill or cause grievous bodily harm; even though his attorney had not relied on this defence argument, the Judge was under a duty to address it. Further, he claims that the Judge erred in law while summing up the case for the jury, inter alia with respect to the issues of self-defence, provocation and the author's intent.

3.2 Referring to the delays in the execution of his death sentence, the author contends that they are contrary to due process of law and to Section 14, paragraph 1, of the Jamaican Constitution, which stipulates that an accused person's trial and the execution of the sentence handed down should take place within a reasonable time. Furthermore, he alleges that the delay in the execution of the sentence is contrary to Section 17, paragraph 1, of the Constitution, which lays down that no person shall be subjected to torture or to degrading punishment or treatment. He argues that the length of time spent on death row and the permanent anxiety he lives in constitutes such degrading treatment.

3.3 The author further claims that his 17 days' stay in the death cell, after a warrant for his execution was issued and before the last minute reprieve, caused him unnecessary mental and physical suffering, in violation of article 7 of the Covenant.

State party's observations and the author's comments thereon

4. In its submission under rule 91, dated 1 December 1988, the State party argues that the communication is inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol, because the author has failed to exhaust domestic remedies available to him under Section 25 of the Constitution.

5. By a letter dated 9 May 1989, author's counsel contests that the procedure referred to by the State party is an effective domestic remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. He argues that the State party does not provide legal aid with respect to a constitutional motion before the Supreme Court of Jamaica. Accordingly, the author cannot

avail himself of the remedy indicated by the State party, since he cannot afford to instruct a lawyer. Counsel further observes that the Jamaica Council for Human Rights has tried in vain to solicit the services of a lawyer to prepare, on a no-fee basis, a constitutional motion on behalf of the author.

Committee's decision on admissibility

6.1 At its thirty-eighth session, the Committee considered the admissibility of the communication. It noted the State party's contention that the communication was inadmissible because of the author's failure to pursue constitutional remedies available to him. In this connection, the Committee observed, taking into account the absence of legal aid for filing a constitutional motion and the unwillingness of Jamaican counsel to act in this regard without remuneration, that recourse to the Supreme Court under Section 25 of the Jamaican Constitution was not a remedy available to the author within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

6.2 The Committee further considered that part of the author's allegations concerning irregularities in the court proceedings were inadmissible under article 3 of the Optional Protocol, since it is, in principle, beyond the competence of the Committee to review specific instructions to the jury in a trial by jury.

6.3 On 15 March 1990, the Committee declared the communication admissible in so far as it might raise issues under articles 7 and 14, paragraphs 3 (c) and 5 of the Covenant.

Review of admissibility

7. The State party, in its submissions dated 11 February 1991 and 14 January 1992, challenges the Committee's admissibility decision and maintains that the communication is inadmissible. It argues that the author has constitutional remedies he may still pursue. It submits that, in the light of cases recently decided by the Supreme (Constitutional) Court, it is clear that this Court has jurisdiction to allow applications for redress with regard to cases in which criminal appeals have been dismissed. It further argues that the absence of legal aid does not relieve a person of the obligation to exhaust domestic remedies. It submits that nothing in the Covenant imposes upon a State party the duty to provide legal aid other than to an accused in the determination of a criminal charge against him.

8. In his comments on the State party's request for review of the admissibility decision, author's counsel argues that, while it is in theory possible for the author to file a constitutional motion, in practice the absence of legal aid and the unwillingness of lawyers to provide legal assistance in these matters without remuneration renders this right illusory.

9. The Committee has taken note of the arguments submitted to it by the State party and reiterates that domestic remedies within the meaning of the Optional Protocol must be both available and effective. The Committee considers that, in the absence of legal aid, a constitutional motion does not, in the specific circumstances of the instant case, constitute an available remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, which the author should still exhaust. a/ There is therefore no reason to revise the Committee's earlier decision on admissibility of 15 March 1990.

Examination of the merits

10. In its submission, dated January 1992, the State party denies that the Covenant was violated in the author's case. It submits that the delay in carrying out the death sentence against the author resulted from the author's exercise of his right to appeal against conviction and sentence to the Judicial Committee of the Privy Council. As regards the alleged violation of article 14, paragraph 5, of the Covenant, the State party argues that the author has appealed his conviction to the Court of Appeal and the Judicial Committee of the Privy Council, and thus has not been denied the right to have his conviction and sentence reviewed by a higher tribunal.

11. In his comments on the State party's submission, author's counsel argues that the delay in carrying out the death sentence cannot be attributed to the exercise by the author of the right to further appeal his conviction. He submits that the author was being held on death row for over six years before a warrant for his execution was issued, and that an appeal to the Privy Council was only lodged on his behalf on 25 May 1988, after he had obtained a stay of execution in February 1988.

12.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

12.2 As to the author's allegation that his prolonged stay on death row constitutes cruel, inhuman or degrading treatment, the Committee refers to its jurisprudence in communications Nos. 270 and 271/1988 b/ and reiterates that prolonged judicial proceedings do not per se constitute cruel, inhuman or degrading treatment, even if they may be a source of mental strain and tension for detained persons. In the instant case, the delay between the judgement of the Court of Appeal and the dismissal of the author's petition to the Judicial Committee of the Privy Council has been disturbingly long. However, the evidence before the Committee indicates that the Court of Appeal promptly produced its written judgement and that the ensuing delay in petitioning the Judicial Committee was largely attributable to the author. In the circumstances of the present case, the Committee affirms its jurisprudence that even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.

12.3 The author further alleges that the delay of 17 days between the issuing of the warrant for his execution and its stay, during which time he was detained in a special cell, constitutes a violation of article 7 of the Covenant. The Committee observes that, after the warrant had been issued, a stay of execution was requested, on the grounds that counsel would prepare a petition for leave to appeal to the Judicial Committee of the Privy Council. This stay of execution was subsequently granted. Nothing in the information before the Committee indicates that the applicable procedures were not duly followed, or that the author continued to be detained in the special cell after the stay of execution had been granted. The Committee therefore finds that the facts before it do not disclose a violation of article 7 of the Covenant.

12.4 The author also alleges that his trial suffered from undue delay and that he was denied the right to have his conviction and sentence reviewed by a higher tribunal. The Committee observes that the author was convicted and sentenced by the Circuit Court of Kingston on 17 February 1981 and that his appeal was

dismissed by the Court of Appeal on 11 November 1981. The Committee notes that the subsequent delay in obtaining a hearing before the Judicial Committee of the Privy Council, which dismissed special leave to appeal on 11 July 1988, is primarily attributable to the author, who did not file his petition to the Judicial Committee until after a warrant for his execution had been issued in 1988, six and a half years after the Court of Appeal's judgement. The Committee therefore concludes that the facts before it do not disclose a violation of article 14, paragraphs 3 (c) and 5, of the Covenant.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the provisions of the International Covenant on Civil and Political Rights.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ See also the Committee's views in communications Nos. 230/1987 (Raphael Henry v. Jamaica) and 283/1988 (Aston Little v. Jamaica), adopted on 1 November 1991, paras. 7.1 et seq.

b/ Randolph Barrett and Clyde Sutcliffe v. Jamaica, views adopted on 30 March 1992.

K. Communication No. 320/1988, Victor Francis v. Jamaica (views adopted on 24 March 1993, forty-seventh session)*

Submitted by: Victor Francis (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of communication: 10 July 1988

Date of decision on admissibility: 4 July 1991

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 March 1993,

Having concluded its consideration of communication No. 320/1988, submitted to the Human Rights Committee by Victor Francis under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication (initial submission dated 10 July 1988 and subsequent submissions) is Victor Francis, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of a violation of articles 7, 10 and 14, paragraphs 3 (c) and 5, of the International Covenant on Civil and Political Rights by Jamaica. He is represented by counsel.

Facts as submitted

2.1 The author was charged with the murder, on 6 February 1981, of a child, Kimberley Ann Longmore. The prosecution's contention was that the author, together with another unidentified man, killed the child by shooting at random into a "board house". At the trial, the child's mother testified that her child was shot while she and her other children were hiding from the gunfire that had erupted outside her house. She added that she could not see the men who were firing, since, at the time in question, the street lights were off and so were the lights of other houses in the neighbourhood.

2.2 Two prosecution witnesses identified the author as one of the men they saw at the time of the shooting. The first, one Janet Gayle, testified that she could observe the two men firing through a fence. The second, one

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* Pursuant to rule 85 of the Committee's rules of procedure, Committee member Mr. Laurel Francis did not take part in the adoption of the Committee's views.

Robert Bailey, asserted that both men were carrying "long guns" and that the lights in the area were on at the time of the shooting. The author claimed to be innocent and contended that, at the relevant time, he was at his mother's home, asleep with his wife. His wife reportedly confirmed his alibi.

2.3 On 20 January 1982, the author was found guilty as charged and sentenced to death. On 4 February 1983, the Court of Appeal of Jamaica dismissed his appeal. The Court gave an oral judgement, but, in spite of numerous requests, did not provide written reasons for its decision. Owing to the absence of the Court of Appeal's written judgement, the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal on 20 February 1987.

Complaint

3.1 The author alleges that he was denied a fair trial in that several irregularities occurred during its conduct. He claims that the evidence of the witnesses against him was contradictory and that there were discrepancies between their testimony during the trial and their original statements, especially as to whether street lights were on in the area during the night of the murder. He further submits that defence counsel requested an adjournment of the trial in order to obtain evidence about the lighting conditions at the time the murder took place. The judge allegedly denied his request. In this context, it is also pointed out that no evidence was produced by the prosecution to establish that the author owned a gun, nor was a ballistic report presented to establish a causal link between any gun he may have been carrying and the child's death.

3.2 The author claims that the Court of Appeal's failure to issue a written judgement violates his right under article 14, paragraph 3 (c), to be tried without undue delay and his right under article 14, paragraph 5, to have his conviction and sentence reviewed. He indicates that the absence of a written judgement of the Court of Appeal in his case resulted in the dismissal of his petition for special leave to appeal by the Judicial Committee of the Privy Council. More specifically, he explains that the dismissal of his petition was due, in particular, to his failure to meet the requirements of the Judicial Committee's rules of procedure, namely, to explain the grounds on which he was seeking special leave to appeal, and to provide the Judicial Committee with copies of the decisions of lower courts.

3.3 The author further submits that his representative invited the Judicial Committee of the Privy Council (a) to allow the petition on the ground that the failure of the Court of Appeal to provide a written judgement in a capital case was such a violation of the principles of natural justice that leave to appeal should be granted, and (b) to remit the case to Jamaica with a direction, under Section 10 of the Judicial Committee Act 1844, that the Court of Appeal be required to provide written reasons. According to the author, the failure of the Judicial Committee of the Privy Council to adopt one of the above courses of action left him with no available legal remedy.

3.4 The author finally alleges that he has been subjected to violations of articles 7 and 10 of the Covenant. He claims that on the night of 9 July 1988, twenty to twenty-five soldiers and over twenty warders searched a block of St. Catherine District Prison known as the New Hall. After concluding the search, they returned to Wards C and D of the block, where they allegedly brutalized and severely beat the convicts, including the author, after the latter had been pointed out by the warders. The author adds that one soldier

entered his cell, beat him badly on the head and pushed him with a bayonet. Allegedly, three warders participated in this assault. The soldiers are further said to have emptied a urine bucket over the author's head, thrown his food and water on the floor and his mattress out of the cell. Many inmates reportedly suffered from similar maltreatment on the same night. The author further alleges that the events were witnessed by two Assistant Superintendents of the prison and one overseer, who apparently did not make any attempt to intervene.

3.5 With regard to the requirement of exhaustion of domestic remedies, the author submits that, following his maltreatment at St. Catherine District Prison, he wrote about the incident to the Senior Parliamentary Ombudsman. On 29 July and 25 November 1988, he received a reply from the latter's office, which informed him that the matter had been referred to the competent authorities for investigation, and that as soon as the result became known he would be so notified. Since then he has not received any notice. The author further wrote to the Minister of Justice about the same matter, but did not receive any reply.

State party's observations and author's comments

4. The State party contends that, with regard to the author's allegations that, on 9 July 1988, he was subjected to inhuman and degrading treatment at St. Catherine District Prison, the communication is inadmissible for non-exhaustion of domestic remedies, since the author has failed to pursue constitutional remedies available to him. The State party submits that Section 17 of the Jamaican Constitution guarantees protection from cruel, inhuman and degrading treatment, and that pursuant to Section 25, anyone who alleges that a right protected by the Constitution has been, is being or is likely to be contravened in relation to him may apply to the Supreme (Constitutional) Court for redress.

5. In his reply to the State party's submission, the author states that a constitutional motion is not, in the circumstances, an effective remedy available to him, within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. He adds that the State party does not provide legal aid with respect to filing a constitutional motion before the Supreme (Constitutional) Court of Jamaica, and that, as a result, he is effectively barred from exercising his constitutional rights, since he cannot afford to retain counsel.

Committee's decision on admissibility

6.1 At its forty-second session, the Committee considered the admissibility of the communication. It noted that part of the author's allegations related to the conduct of the trial by the trial judge and the evaluation of corroborative evidence. Since it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and the evidence placed before the domestic courts, the Committee declared this part of the communication inadmissible under article 3 of the Optional Protocol.

6.2 The Committee concluded, in the absence of any information provided by the State party, that the author's other allegations regarding a violation of article 14 were admissible.

6.3 As to the author's allegations under articles 7 and 10 of the Covenant, the Committee noted the State party's contention that this part of the communication was inadmissible because of the author's failure to pursue the constitutional

remedies available to him. It also noted the author's contention that the remedy indicated by the State party was not a remedy available to him because of his lack of financial means and the unavailability of legal aid for purposes of filing a constitutional motion to the Supreme (Constitutional) Court of Jamaica. The Committee further considered that the author had demonstrated that he had made reasonable efforts through administrative demarches to seek redress in respect of the ill-treatment allegedly suffered while in detention. The Committee therefore found that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

6.4 On 4 July 1991, the Committee therefore declared the communication admissible in so far as it might raise issues under articles 7, 10 and 14 of the Covenant.

Review of admissibility

7. In its submission dated 16 January 1992, the State party challenges the Committee's admissibility decision. It argues that the communication is inadmissible, since the author failed to exhaust constitutional remedies available to him. It submits that, in the light of cases recently decided by the Supreme Court, it is clear that the Supreme Court has jurisdiction to allow applications for redress with regard to cases in which criminal appeals have been dismissed.

8. In his comments on the State party's submission, author's counsel argues that, while it is in theory possible for the author to file a constitutional motion, in practice this right is illusory in the light of the absence of legal aid.

9.1 The Committee has taken note of the State party's arguments on admissibility formulated after the Committee's decision declaring the communication admissible, especially in respect of the availability of constitutional remedies which the author may still pursue. It recalls that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed.

9.2 However, the Committee also recalls that by submission of 10 October 1991 concerning another case, a/ the State party indicated that legal aid is not provided for constitutional motions, and that it has no obligation under the Covenant to make legal aid available in respect of such motions, as they do not involve the determination of a criminal charge, as required under article 14, paragraph 3 (d), of the Covenant. In the view of the Committee, this supports the finding, made in the decision on admissibility, that a constitutional motion is not an available remedy for an author who has no means of his own to pursue it. In this context, the Committee observes that the author does not claim that he is absolved from pursuing constitutional remedies because of his indigence; rather it is the State party's unwillingness or inability to provide legal aid for the purpose that renders the remedy one that need not be pursued for purposes of the Optional Protocol. Accordingly, there is no reason to revise the decision on admissibility of 4 July 1991.

Examination of the merits

10. The State party argues that it is not clear to which articles and paragraphs of the Covenant the allegations of the author refer. It therefore refrains from submitting comments on the substance of the allegations.

11. In his comments on the State party's submission, author's counsel submits that it is clear from earlier submissions and the Committee's admissibility decision which matters give rise to the author's complaint under article 14. He further states that the allegations of ill-treatment relate to article 10, paragraph 1, juncto article 7 of the Covenant.

12.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol. The Committee notes with concern that the State party has not addressed the author's specific claims under articles 7, 10 and 14 of the Covenant. Article 4, paragraph 2, of the Optional Protocol enjoins the State party to investigate in good faith all the allegations made against it, and to make available to the Committee all the information at its disposal. In the circumstances due weight must be given to the author's allegations, to the extent that they have been substantiated.

12.2 The author claims that the failure of the Court of Appeal to issue a written judgement violates his right under article 14, paragraph 3 (c), to be tried without undue delay, and his right under article 14, paragraph 5, to have his conviction and sentence reviewed. The Committee recalls that article 14, paragraph 3 (c), and article 14, paragraph 5, are to be read together, so that the right to review of conviction and sentence must be made available without delay. b/ In this connection, the Committee refers to its views concerning communications Nos. 230/1987 and 283/1988, c/ where it held that under article 14, paragraph 5, a convicted person is entitled to have, within reasonable time, access to written judgements, duly reasoned, for all instances of appeal in order to enjoy the effective exercise of the right to have conviction and sentence reviewed by a higher tribunal according to law. The Committee is of the opinion that the failure of the Court of Appeal to issue a written judgement, more than nine years after the dismissal of the appeal, constitutes a violation of article 14, paragraphs 3 (c) and 5.

12.3 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal". d/ In the present case, the final sentence of death was passed without there having been any possibility of appeal. Accordingly, there has also been a violation of article 6.

12.4 With regard to the author's allegation of ill-treatment in detention, the Committee notes that where the State party has not replied to the Committee's request for clarifications, due weight must be given to the author's allegations. In this context, the Committee observes that the author has made

specific allegations, which have not been contested by the State party, that, on 9 July 1988, he was assaulted by soldiers and warders, who beat him, pushed him with a bayonet, emptied a urine bucket over his head, threw his food and water on the floor and his mattress out of the cell. In the Committee's view, this amounts to degrading treatment within the meaning of article 7 and also entails a violation of article 10, paragraph 1.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7 and 10, paragraph 1, article 14, paragraphs 3 (c) and 5, and consequently article 6, of the International Covenant on Civil and Political Rights.

14. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The failure to provide a right of appeal in accordance with article 14, paragraph 5, means that Mr. Francis did not receive a fair trial within the meaning of the Covenant. He is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy. The Committee is of the view that in the circumstances of the case, this entails his release. As regards the violation of articles 7 and 10, of which Mr. Francis also is a victim, he is entitled to a remedy, including appropriate compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

15. The Committee would wish to receive information, within ninety days, on any relevant measures taken by the State party in respect of the Committee's views.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ Communication No. 283/1988 (Aston Little v. Jamaica), views adopted on 1 November 1991.

b/ See the Committee's views concerning communications Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica), adopted on 6 April 1989, paras. 13.3 to 13.5.

c/ Raphael Henry v. Jamaica and Aston Little v. Jamaica, views adopted on 1 November 1991.

d/ See CCPR/C.21/Rev.1, General Comment 6 [16], para. 7.

L. Communication No. 326/1988, Henry Kalenga v. Zambia (views adopted on 27 July 1993, forty-eighth session)

Submitted by: Henry Kalenga

Victim: The author

State party: Zambia

Date of communication: 18 November 1988 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 1993,

Having concluded its consideration of communication No. 326/1988, submitted to the Human Rights Committee by Mr. Henry Kalenga under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Henry Kalenga, a Zambian citizen currently residing in Kitwe, Zambia. He claims to be a victim of violations by Zambia of articles 9, 14 and 19 of the International Covenant on Civil and Political Rights.

Facts as submitted

2.1 On 11 February 1986, the author was arrested by the police of the city of Masala; he was forced to spend the night in a police lock-up. On 12 February 1986, a statement was taken from him. The following day, a police detention order was issued against him pursuant to Regulation 33 (6) of the Preservation of Public Security Act. This order was revoked on 27 February 1986 but immediately replaced by a Presidential detention order, issued under Regulation 33 (1) of the said Act.

2.2 The author notes that the Preservation of Public Security Regulations allow the President of Zambia to authorize the administrative detention of persons accused of political offences for an indefinite period of time, "for purposes of preserving public security". The author was informed of the charges brought against him on 13 March 1986, that is over one month after his arrest. He was subsequently kept in police detention, on charges of (a) being one of the founding members and having sought to disseminate the views of a political organization, the so-called People's Redemption Organization - an organization considered illegal under Zambia's (then) one-party Constitution - and (b) of preparing subversive activities aimed at overthrowing the regime of (then) President Kenneth Kaunda. The author was released on 3 November 1989, following a Presidential order.

2.3 After his release, the author was placed under surveillance by the Zambian authorities. The latter allegedly denied him his passport, thereby depriving him of his freedom of movement. Moreover, he claims that as a former political

prisoner, he was subjected to harassment and intimidation by the authorities, which also reportedly denied him access to governmental and private financial institutions.

Complaint

3.1 Mr. Kalenga contends that at the time of his arrest, he was not engaged in any political activities aimed at undermining the government. Instead, he had been promoting campaigns protesting the government's national education, military and economic policies. He adds that the subversive activities he was accused of amounted to no more than burning the card affiliating him with President Kaunda's party, UNIP. He claims that, as a prisoner of conscience, he was subjected to unlawful detention, because he was formally informed about the reasons for his detention more than a month following his arrest, contrary to the Regulations mentioned in paragraph 2.1 above and article 27, paragraph 1 (a), of the Zambian Constitution. The latter provision stipulates that the grounds of detention must be supplied within fourteen days following the arrest. In this connection, the author asserts that the charges against him had no basis in fact at the time of his arrest and that they were "fabricated" by the police in order to justify his detention.

3.2 The author further affirms that throughout his detention, he was not brought before a judge or judicial officer to establish his guilt. This allegedly was attributable to the fact that under Zambian legislation regulating public security issues, individuals may be detained indefinitely without being formally charged or tried.

3.3 The author contends that he was subjected to inhuman and degrading treatment during his detention. He claims that he was frequently deprived of food, of access to recreational activities as well as medical assistance, despite the continuing deterioration of his state of health. Moreover, he claims to have been subjected to various forms of "psychological torture". This treatment is said to be prohibited under articles 17 and 25 (2) and (3) of the Zambian Constitution.

3.4 With respect to the requirement of exhaustion of domestic remedies, the author states that he instituted proceedings against the State during his detention. Initially, he filed an application for writ of habeas corpus with the High Court of Zambia. On 23 June 1986, the High Court dismissed his application, on the ground that the author's detention was not in violation of domestic laws. The author then filed another request for writ of habeas corpus with the High Court of Justice, in which he (a) challenged the legality of his detention, (b) complained about the inhuman and degrading treatment suffered during detention, and (c) requested compensation and damages. On 14 April 1989, the application was dismissed by the Court, which declared itself incompetent to deal with the matter on the basis of res judicata. The author then petitioned a special tribunal established under the Preservation of Public Security Regulations; this tribunal has the mandate to review periodically the cases of political prisoners and is authorized to recommend either continued detention or release. The tribunal sits, however, in camera, and the President is not obliged to implement its recommendations, made confidentially. On 29 and 30 December 1988, the author was heard by this tribunal. As the State prosecutor could not adduce evidence in support of the charges against the author, the tribunal recommended Mr. Kalenga's immediate release. None the less, release did not occur until 10 months later, as President Kaunda did not follow up on the recommendation.

Committee's decision on admissibility and the parties' submissions on the merits

4.1 During its forty-third session in October 1991, the Committee considered the admissibility of the communication. It noted with concern the absence of any State party cooperation on the matter, as the State party had failed to make submissions on the admissibility of the case in spite of two reminders. On the basis of the information before it, it concluded that the author had met the requirements under article 5, paragraph 2 (b), of the Optional Protocol, and that he had sufficiently substantiated his allegations, for purposes of admissibility.

4.2 On 15 October 1991, the Committee declared the communication admissible in as much as it appeared to raise issues under articles 7, 9, 10, 12 and 19 of the Covenant.

5.1 In a submission, dated 28 January 1992, the State party indicates that "Mr. Henry Kalenga has been released from custody and is a free person now". No information about the substance of the author's allegations, nor copies of his indictment or of any judicial orders concerning his detention and the alleged legality thereof, have been provided by the State party. The State party did not reply to a reminder addressed to it in February 1993.

5.2 In an undated letter received on 24 March 1992, the author requests the Committee to continue consideration of his case. He adds that he continues to suffer from stomach ulcers and a deplorable financial situation as a result of his detention; he further contends that the change in Government, in the spring of 1992, has not changed the authorities' attitude towards him.

Examination of the merits

6.1 The Committee has considered the communication in the light of all the information provided by the parties. It notes with concern that, with the exception of a brief note informing the Committee about the author's release, a fact known to the Committee by the time of the adoption of the admissibility decision, the State party has failed to cooperate on the matter under consideration. It is implicit in article 4, paragraph 2, of the Optional Protocol that a State party investigate in good faith the allegations brought against it, and that it provide the Committee with all the information at its disposal, including all available judicial documents. The State party has failed to provide the Committee with any such information. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

6.2 In respect of issues under article 19, the Committee is of the opinion that the uncontested response of the Zambian authorities to the author's attempts to express his opinions freely and to disseminate the tenets of the People's Redemption Organization constitute a violation of his rights under article 19 of the Covenant.

6.3 The Committee is of the opinion that the author's right, under article 9, paragraph 2, to be promptly informed about the reasons for his arrest and of the charges against him, has been violated, as it took the State party authorities almost one month to so inform him. Similarly, the Committee finds a violation of article 9, paragraph 3, as the material before it reveals that the author was not brought promptly before a judge or other officer authorized by law to exercise judicial power. On the other hand, on the basis of the chronology of

judicial proceedings provided by the author himself, the Committee cannot conclude that Mr. Kalenga was denied his right, under article 9, paragraph 4, to take proceedings before a court of law.

6.4 The author has claimed, and the State party has not denied, that he continues to suffer restrictions on his freedom of movement, and that the Zambian authorities have denied him his passport. This, in the Committee's opinion, amounts to a violation of article 12, paragraph 1, of the Covenant.

6.5 As to Mr. Kalenga's claim of inhuman and degrading treatment in detention, the Committee notes that the author has provided information in substantiation of his allegation, in particular concerning the denial of recreational facilities, the occasional deprivation of food and failure to provide medical assistance when needed. Although the author has not shown that such treatment was cruel, inhuman and degrading within the meaning of article 7, the Committee considers that the State party has violated the author's right under article 10, paragraph 1, to be treated with humanity and respect for the inherent dignity of his person.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee disclose violations of articles 9, paragraphs 2 and 3; 10, paragraph 1; 12, paragraph 1; and 19, of the Covenant.

8. Pursuant to article 2 of the Covenant, the State party is under an obligation to provide Mr. Kalenga with an appropriate remedy. The Committee urges the State party to grant appropriate compensation to the author; the State party is under an obligation to ensure that similar violations do not occur in the future.

9. The Committee would wish to receive information, within ninety days, on any relevant measures taken by the State party in respect of the Committee's views.

[Done in English, French and Spanish, the English text being the original version.]

M. Communication No. 334/1988, Michael Bailey v. Jamaica (views adopted on 31 March 1993, forty-seventh session)*

Submitted by: Michael Bailey (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of communication: 22 February 1988 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1993,

Having concluded its consideration of communication No. 334/1988, submitted to the Human Rights Committee by Mr. Michael Bailey under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Michael Bailey, a Jamaican citizen born in September 1963, currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 7 and 14, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 Michael Bailey was arrested on 27 August 1984 and charged with the murder, on 21 June 1984, of Maxine Gordon, a 19-year-old woman. He was tried in the Home Circuit Court of Kingston, found guilty as charged and sentenced to death on 30 July 1985. The Court of Appeal dismissed his appeal on 30 July 1986, issuing its written judgement on 13 November 1986. The Judicial Committee of the Privy Council denied special leave to appeal on 24 March 1988. With this, it is submitted, available and effective domestic remedies have been exhausted.

2.2 During the trial, the prosecution relied primarily upon a written deposition made shortly after the murder by Pauline Ellis, the mother of Maxine Gordon; Mrs. Ellis herself died before the beginning of the trial, but the judge admitted her written deposition as evidence, according to which Maxine and her mother had been in the latter's bedroom at approximately 8 p.m. on 21 June 1984. Upon hearing noises, Maxine looked out of the window and walked out on the verandah of the house. Mrs. Ellis then heard two shots, upon which

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* Pursuant to rule 85 of the Committee's rules of procedure, Committee member Mr. Laurel Francis did not take part in the adoption of the Committee's views.

her daughter rushed back into the bedroom and hid beneath the bed. Michael Bailey followed her, armed with a gun, broke into the bedroom and fired several shots under the bed, despite Mrs. Ellis' attempts to intervene.

2.3 The prosecution further contended that upon his arrest and after being cautioned, the author admitted having shot Maxine Gordon, invoking as motive a long-standing argument with her. During the trial, in an unsworn statement from the dock, the author denied any involvement in the crime; he affirmed that at the time in question he had been at home with his brother and sister. In this connection, he submits that when cross-examined by defence counsel during the trial, the arresting officer admitted that the diary in which he had recorded the author's alleged confession was not in his possession anymore, and that he could not remember what he had done with it.

Complaint

3.1 The author contends that he was denied a fair trial, in violation of article 14, paragraph 1, of the Covenant; he explains that after the summing up of the case by the judge and after consideration of the verdict by the jury, the foreman of the jury told the judge that no unanimous verdict had been reached and that he wished to raise a particular issue. The judge inquired as to whether this concerned an issue of fact or of law; as it referred to a matter extraneous to the conduct of the case, the judge refused to allow the question and directed the jury to retire and to reconsider their verdict without further delay. After another 45 minutes, the jury returned a guilty verdict.

3.2 It is submitted that the judge should have allowed the foreman's question and that he failed to properly instruct the jury. The author further contends that the judge exerted undue pressure on the jurors to return a verdict without delay, which is deemed to be contrary to the principles laid down by the Court of Appeal in the case of McKenna. In this context, counsel submits that in the circumstances, it was particularly important to let the jury consider its verdict freely and carefully, as the evidence against the author was based primarily upon the deposition by a witness whose veracity could not be tested by cross-examination.

3.3 The author affirms, without giving further details, that his legal representation was inadequate, that his court-appointed lawyer was inexperienced and that the judge unjustly objected to several questions asked and points raised by this lawyer.

3.4 The author further claims to have been beaten and ill-treated during detention on death row, in violation of article 7 of the Covenant. He states that, on 29 May 1990, several prison warders took him out of his cell; two warders, whom he names, began to beat him all over his body with batons, an iron pipe and with clubs, in the presence of an overseer. When he implored the overseer to stop the warders, the overseer allegedly told him to keep quiet. The author complains that he suffered bruises, slashes and cuts, and that he was so severely injured that he had to crawl back into his cell. In a letter dated 14 March 1991, which was confirmed by counsel on 25 September 1991, he notes that in spite of injuries to his head and his hands, he has not been seen by a prison doctor, in spite of repeated requests. He contends that it would not be possible now to obtain a report on his injuries from the prison's Pharmaceutical Department.

3.5 Concerning the requirement of exhaustion of domestic remedies, the author submits, with respect to his claim under article 7, that he wrote to the Parliamentary Ombudsman, asking that someone visit him in the prison to take a statement from him. Following this request, he was allegedly threatened by prison warders and now has to fear for his life.

3.6 As to the claims under article 14 of the Covenant, the author contends that a constitutional motion would not be an effective remedy within the meaning of the Optional Protocol. He notes that he cannot afford to privately retain counsel for the purpose and adds that the State party does not provide legal aid for constitutional motions. Counsel in London observes that there is no tradition in Jamaica for lawyers to offer free legal services and points out that there has been only one instance in which Jamaican lawyers agreed to act on a pro bono basis for purposes of a constitutional motion, i.e. in the cases of Pratt and Morgan. a/ Even if counsel in London were to accept to appear on such a basis on the author's behalf, he would have no locus standi before the Constitutional Court.

State party's comments and observations on admissibility

4.1 In a submission dated 7 July 1989, the State party contends that the communication is inadmissible on the grounds of the author's failure to petition the Judicial Committee of the Privy Council for special leave to appeal. Although the author's petition to the Judicial Committee had been dismissed on 24 March 1988, no further comments were received from the State party in this respect prior to the consideration of the admissibility of the communication.

4.2 The State party did not provide information in respect of the admissibility of the author's claims under article 7, in spite of two specific requests addressed to it on 8 May and 20 August 1991.

Committee's decision on admissibility

5.1 During its forty-third session, the Committee considered the admissibility of the communication. It noted that the State party had failed to provide detailed information in respect of the admissibility of the author's claims under articles 7 and 14 of the Covenant and decided, on the basis of the information before it, that it was not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

5.2 The Committee further noted that part of the author's allegations concerned the judge's conduct of the trial. It reaffirmed its jurisprudence that it is not in principle for the Committee to review specific instructions to the jury by the judge or the judge's reluctance to entertain a question posed by the foreman of the jury, unless it can be ascertained that the instructions to the jury or the judge's conduct are clearly arbitrary or amount to a denial of justice. As the Committee lacked evidence that the judge's instructions suffered from such defects, it concluded that the author's claims under article 14 of the Covenant were inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

5.3 On 18 October 1991, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7 and 10 of the Covenant.

State party's objections to the decision on admissibility and counsel's further comments

6.1 In a submission dated 30 April 1992, the State party contends that the communication remains inadmissible because the author has failed to avail himself of constitutional remedies. Thus, Section 17, paragraph 1, of the Constitution prohibits inhuman and degrading treatment, and where a breach of this right is alleged, Section 25 of the Constitution provides for an application to the Supreme (Constitutional) Court for redress.

6.2 In addition, the State party contends, the author would have other remedies in respect of ill-treatment by prison officials. Apart from complaining to the Ombudsman, he could complain to the Department of Corrections. Moreover, he could file an action for damages for assault in respect of the alleged breaches.

6.3 The State party notes that "investigations are in fact being undertaken by the Inspectorate of the Ministry of Justice in respect of the applicant's complaint and a report on the matter is pending. In the circumstances, it would be improper for the Committee to make a finding on the merits of the case".

7.1 In his comments, counsel reaffirms that a constitutional motion would not be an effective remedy for Mr. Bailey, due to the unavailability of legal aid for the purpose. With respect to the possibility of filing complaints with the Ombudsman and the Inspectorate of the Department of Corrections, counsel notes that the author did notify the Ombudsman of his grievances and that, as a result, he was subjected to threats and intimidation by prison warders. It is submitted that in the circumstances, such a complaint is unlikely to yield concrete results; furthermore, counsel notes that the State party has failed to point out how an inquiry by the Department of Corrections would be conducted, what its powers would be, what the author's rights in such an inquiry would be, and what type of redress or remedy could be ordered upon conclusion of such an inquiry. Counsel dismisses the suggestion that an "official report could compensate Mr. Bailey for the injuries sustained or in any way supply him with an adequate remedy".

7.2 Counsel dismisses the possibility of a civil action for damages for assault as "wholly unpractical and unrealistic" in the circumstances of the case described above. Furthermore, he notes that Mr. Bailey would once again depend on legal aid for the purpose, and the State party has not suggested that legal aid would be available for a civil action for damages.

Post-admissibility proceedings and examination of merits

8.1 The Committee has taken note of the State party's arguments on admissibility formulated after the Committee's decision declaring the communication admissible, especially in respect of the availability of constitutional remedies which the author may pursue, as well as of counsel's further comments on this issue. It recalls that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed.

8.2 However, the Committee also recalls that by submission of 10 October 1991 in a different case, b/ the State party indicated that legal aid is not provided for constitutional motions, and that it has no obligation under the Covenant to make legal aid available in respect of such motions, as they do not involve the

determination of a criminal charge, as required under article 14, paragraph 3 (d), of the Covenant. In the view of the Committee, this supports the finding that a constitutional motion is not an available and effective remedy for an author who has no means of his own to pursue it. In this context, the Committee observes that the author does not claim that he is absolved from pursuing constitutional remedies because of his indigence; rather, it is the State party's unwillingness or inability to provide legal aid for the purpose that renders the remedy one that need not be pursued for purposes of the Optional Protocol. Similarly, in the circumstances of the case, a complaint to the Department of Corrections is not a remedy which the author is required to exhaust for purposes of the Optional Protocol. Accordingly, there is no reason to revise the decision on admissibility of 18 October 1991.

9.1 The Committee notes that the State party has confined itself essentially to issues of admissibility and that it considers it "improper" for the Committee to make a finding on the merits of the author's allegations while investigations into his alleged ill-treatment on death row are said to be pending. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate thoroughly, in good faith and within the imparted deadlines, all the allegations of violations of the Covenant made against it and against its judicial authorities, and to make available to the Committee all the information at its disposal.

9.2 The author has alleged that he suffered beatings and injuries at the hand of prison officers during an incident on 29 May 1990. This claim has not been refuted by the State party, which has confined itself to the mere statement that the claim is being investigated and that, in the circumstances, it would be inappropriate for the Committee to make a finding on the merits.

9.3 The Committee is unable to share the State party's reasoning. Firstly, the author's claim that he was threatened by warders when he sought to pursue his complaint with the Ombudsman has remained uncontested. Secondly, the Committee has not been notified whether the investigation into the author's allegations have been concluded some 35 months after the event or whether, indeed, they are proceeding. In the circumstances, it is fully within the Committee's competence to proceed with the examination of the author's claim, and in the absence of any further information on such investigations, due weight must be given to the author's allegations, to the extent that they have been substantiated. The Committee considers that his claims have been substantiated. In the Committee's opinion, the fact that Mr. Bailey was beaten repeatedly with clubs, iron pipes and batons, and then left without any medical attention in spite of injuries to head and hands, amounts to cruel and inhuman treatment within the meaning of article 7 of the Covenant and also entails a violation of article 10, paragraph 1.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

11.1 In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to take effective measures to remedy the violations suffered by Mr. Bailey, including the award of appropriate compensation, and to ensure that similar violations do not occur in the future. In this context, the Committee observes that in other cases, similar uncontested allegations have been the basis of findings, by the Committee, of violations of the Covenant.

11.2 The Committee would wish to receive information, within 90 days, on any relevant measures adopted by the State party in respect of the Committee's views.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ Communications Nos. 210/1986 and 225/1987, views adopted on 6 April 1989.

b/ See communication No. 283/1988 (Aston Little v. Jamaica), views adopted on 1 November 1991, para. 7.3.

N. Communication No. 338/1988, Leroy Simmonds v. Jamaica
(views adopted on 23 October 1992, forty-sixth session)

Submitted by: Leroy Simmonds (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of communication: 22 November 1988

Date of decision on admissibility: 15 March 1990

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 October 1992,

Having concluded its consideration of communication No. 338/1988, submitted to the Human Rights Committee on behalf of Mr. Leroy Simmonds under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.*

1. The author of the communication is Leroy Simmonds, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 The author was charged with the murder, on 15 May 1983 in the Westmoreland area, of one Maurice Forrester; he claims to be innocent of the crime. The prosecution contended that at 4 a.m. on 15 May 1983, the author and another man entered the deceased's house armed with a handgun and a dagger, respectively. They ordered the deceased and his girlfriend, Roselena Brown, out of their bedroom and forced them to board the deceased's rented car, which was driven by a third man. They drove for about half a mile to a rendezvous with another car. An exchange of drivers took place, and a fourth man drove the deceased's car; the other car followed. Upon reaching Spur Tree, the cars turned into a cul-de-sac; there, Mr. Forrester was shot in the head, and Roselena Brown in the mouth. The bodies were placed into the deceased's car, which was doused with petrol and set on fire. Roselena Brown managed to escape in spite of her injuries.

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* An individual opinion submitted by Committee members Mr. Julio Prado Vallejo, Mr. Waleed Sadi and Mr. Bertil Wennergren is appended.

2.2 It was contended that the killing was an act of vengeance, as Mr. Forrester was said to have given information to the police. On 13 November 1986, three and a half years after the crime was committed, the author was detained for two weeks, allegedly in the absence of formal charges. His attorney filed a habeascorpus action on his behalf, but on 27 November 1986, the author was formally charged with murder. No identification parade was held. The author contends that the charges against him were fabricated by the police superintendent in charge of the preliminary investigation. In this context, he observes that throughout the two months of the preliminary investigation, the police was unable to obtain a statement that would have incriminated him, and that it was only when the examining magistrate notified the police that she would have to release the author for lack of evidence that such a statement was produced.

2.3 On 6 November 1987, he was found guilty as charged and sentenced to death. On 25 May 1988, the Court of Appeal dismissed his appeal, treating the hearing of the application for leave to appeal as the appeal itself. On 19 December 1988, the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal.

2.4 During the trial, Roselena Brown testified as the prosecution's principal witness. She made a dock identification of the author on 5 November 1987, and purported to recognize him on the basis of eight photographs shown to her by the police on the day after the murder, when she was hospitalized recovering from her injuries. She further admitted during the trial that she only knew the author under his "alias" name; the author contends that the same "alias" was used by several individuals. The trial judge admitted her evidence. No witnesses were sought to testify on the author's behalf. The author himself made a statement from the dock, maintaining that he had never been to Westmoreland.

2.5 In respect of the issue of exhaustion of domestic remedies, counsel contends that a constitutional motion would not constitute an available and effective remedy to the author in the circumstances of the case, as no legal aid is made available by the State party for the purpose, and no lawyer has accepted to represent the author for this purpose on a pro bono basis.

Complaint

3.1 The author claims that he was denied a fair and impartial trial, in that the trial judge failed properly to exercise his discretion to exclude questionable identification evidence, because he did not object to the author's dock identification, and because he misdirected the jury on the issue of identification.

3.2 The author further claims that his conviction was contrary to article 14, paragraph 3 (b) and (d), of the Covenant and Sections 14, paragraph 1, and 20, paragraph 6, of the Jamaican Constitution, in that he was not given adequate facilities for the preparation of his trial defence and of his appeal. In this context, he claims that the system of legal aid made available in Jamaica to poor persons, such as himself, violates the Jamaican Constitution.

3.3 More specifically, the author contends that he was not informed about either date or outcome of his appeal until two days after it had been dismissed. On the "notice of appeal", dated 10 November 1987, the author had indicated that he wished to be present during the hearing of the appeal and that he did not

wish legal aid to be assigned to him. A legal aid lawyer was assigned to him allegedly without his knowledge; the author contends that this lawyer did not even contact him, so that he could not discuss the appeal with him. The same lawyer argued the appeal on the ground of provocation, without referring to the identification issue, on which the author mainly relied.

State party's observations on admissibility

4. The State party argues that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. It observes that the author's rights under article 14 of the Covenant are coterminous with the rights granted under Section 20 of the Jamaican Constitution. Under the Constitution, anyone who argues that a fundamental right has been, is being or is likely to be infringed in relation to him may apply to the Constitutional Court for redress. The decision of the Constitutional Court may be appealed to the Court of Appeal and from there to the Judicial Committee of the Privy Council. The State party concludes that since the author failed to pursue his constitutional remedies before the Supreme Court, his communication remains inadmissible.

Committee's decision on admissibility

5.1 During its thirty-eighth session in March 1990, the Committee considered the admissibility of the communication. It took note of the State party's contention that the complaint was inadmissible due to Mr. Simmonds' failure to avail himself of constitutional remedies under the Jamaican Constitution. In the circumstances of the case, the Committee considered that recourse to the Constitutional Court under Section 25 of the Jamaican Constitution was not a remedy available to the author within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

5.2 The Committee noted that some of the author's allegations pertained to the issue of adequacy or otherwise of the judge's instructions to the jury, in particular on the issue of the treatment of identification evidence. The Committee reiterated that the review by it of specific instructions to the jury is beyond the scope of application of article 14 of the Covenant, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge clearly violated his obligation of impartiality. In the circumstances, the Committee found that the judge's instructions did not suffer from such defects.

5.3 On 15 March 1990, the Committee declared the communication admissible in respect of article 14, paragraph 3 (b) and (d), of the Covenant.

State party's objections to the decision on admissibility

6.1 In a submission dated 6 February 1991, the State party contends that the Committee's admissibility decision reflects a misunderstanding of the operation of Sections 25(1) and 25(2) of the Jamaican Constitution. The right to apply for redress under Section 25(1) is "without prejudice to any other action with respect to the same matter which is lawfully available". The only limitation in Section 25(2) is not applicable to the case in the State party's opinion, since the alleged breach of the right to a fair trial was not an issue in the author's criminal appeals:

> "... If the contravention alleged was not the subject of the criminal law appeals, ex hypothesi, those appeals could hardly constitute an adequate

remedy for that contravention. The decision of the Committee would render meaningless ... the constitutional rights of Jamaicans and persons in Jamaica, by its failure to distinguish between the right to appeal against the verdict and sentence of the court in a criminal case, and the right to apply for constitutional redress".

6.2 The State party observes that there are judicial precedents which illustrate that recourse to criminal law appellate remedies does not render the proviso of Section 25(2) applicable in situations where, following criminal law appeals, an individual files for constitutional redress.

6.3 In respect of the absence of legal aid for the filing of constitutional motions, the State party observes that nothing in the Optional Protocol or customary international law supports the contention that an individual is relieved of the obligation to exhaust domestic remedies on the ground that his indigence has prevented him from resorting to an available remedy. In this context, it is submitted that the Covenant only imposes a duty to provide legal aid in respect of criminal offences (art. 14, para. 3 (d)). Further, international conventions dealing with economic, social and cultural rights do not impose an unqualified obligation on States to implement such rights: thus, article 2 of the International Covenant on Economic, Social and Cultural Rights provides for the progressive implementation of economic rights. In the circumstances, the State party argues that it is incorrect to infer from the author's indigence and the absence of legal aid for constitutional motions that the remedy is necessarily non-existent or unavailable. Accordingly, the State party requests the Committee to review its decision of admissibility.

Reconsideration of admissibility issues and examination of the merits

7.1 The Committee has taken note of the State party's arguments on admissibility formulated after the Committee's decision declaring the communication admissible, especially in respect of the availability of constitutional remedies which the author may still pursue. It recalls that the Supreme Court of Jamaica has, in recent cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed.

7.2 However, the Committee also recalls that by submission of 10 October 1991 concerning another case, a/ the State party indicated that legal aid is not provided for constitutional motions, and that it has no obligation under the Covenant to make legal aid available in respect of such motions, as they do not involve the determination of a criminal charge, as required under article 14, paragraph 3 (d), of the Covenant. In the view of the Committee, this supports the finding, made in the decision on admissibility, that a constitutional motion is not an available remedy for an author who has no means of his own to pursue it. In this context, the Committee observes that the author does not claim that he is absolved from pursuing constitutional remedies because of his indigence; rather it is the State party's unwillingness or inability to provide legal aid for the purpose that renders the remedy one that need not be pursued for purposes of the Optional Protocol. Accordingly, there is no reason to revise the decision on admissibility of 15 March 1990.

8.1 The Committee notes that, several requests for clarifications notwithstanding, the State party has essentially confined itself to issues of admissibility. Article 4, paragraph 2, of the Optional Protocol enjoins a State party to investigate in good faith and within the imparted deadlines all the

allegations of violations of the Covenant made against it and its judicial authorities, and to make available to the Committee all the information at its disposal. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

8.2 As indicated in the Committee's decision on admissibility, the Committee must determine whether the fact that the author was not in a position to properly prepare his appeal and that he was represented before the Court of Appeal of Jamaica by an attorney not of his choosing amounts to a violation of article 14, paragraph 3 (b) and (d), of the Covenant.

8.3 In this connection, the Committee reaffirms that it is axiomatic that legal assistance must be made available to a convicted prisoner under sentence of death. b/ This applies to the trial in the court of first instance as well as to appellate proceedings. In Mr. Simmonds' case, it is uncontested that legal counsel was assigned to him for the appeal. What is at issue is whether he should have been notified of this assignment in a timely manner and given sufficient opportunity to consult with counsel prior to the hearing of the appeal, and whether he should have been afforded an opportunity to be present during the hearing of the appeal.

8.4 The author's application for leave to appeal to the Court of Appeal, dated 10 November 1987, indicates that he wished to be present during the hearing of the appeal and that he did not wish the Court to assign legal aid to him. The Registry of the Court of Appeal ignored the author's wish, as his application for leave to appeal was heard in his absence and in the presence of a legal aid attorney, B. S., who argued the appeal on a ground that Mr. Simmonds had not wished to pursue. The Committee further notes with concern that the author was not informed with sufficient advance notice about the date of the hearing of his appeal; this delay jeopardized his opportunities to prepare his appeal and to consult with his court-appointed lawyer, whose identity he did not know until the day of the hearing itself. His opportunities to prepare the appeal were further frustrated by the fact that the application for leave to appeal was treated as the hearing of the appeal itself, at which he was not authorized to be present. In the circumstances, the Committee finds a violation of article 14, paragraph 3 (b) and (d).

8.5 The Committee considers that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal". In the present case, as the final sentence of death was passed without having met the requirements for a fair trial set forth in article 14, it must be concluded that the right protected by article 6 of the Covenant has been violated.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee disclose a violation of articles 6 and 14, paragraph 3 (b) and (d), of the Covenant.

10. The Committee is of the view that Mr. Leroy Simmonds is entitled to a remedy entailing his release. It requests the State party to provide information, within ninety days, on any relevant measures taken in respect of the Committee's views.

Notes

a/ Communication No. 283/1988 (Aston Little v. Jamaica), views adopted on 1 November 1991.

b/ Communication No. 272/1988 (Alrick Thomas v. Jamaica), views adopted on 31 March 1992, para. 11.4.

Appendix

Individual opinion submitted by Committee members Mr. Julio Prado Vallejo, Mr. Waleed Sadi and Mr. Bertil Wennergren, pursuant to rule 94, paragraph 3, of the Committee's rules of procedure concerning the Committee's views on communication No. 338/1988 (Leroy Simmonds v. Jamaica)

The author's complaint centres on the proposition that the Court of Appeal of Jamaica failed to provide him with a fair trial.

The violations of article 14, paragraph 3 (b) and (d), and in consequence of article 6, of the Covenant are well substantiated. Where we differ is in respect of the remedy suggested to the State party by the Committee. The Committee proposes the release of the author; we do not agree with this remedy, in the light of the nature of and the circumstances under which the offence had occurred, and which were neither refuted nor confirmed because of the deficiencies in the judicial proceedings. Accordingly, the most appropriate way of remedying what occurred would be to see to it that the author will be afforded another opportunity to obtain a fair trial. This result can be obtained by assisting the author in pursuing constitutional remedies.

It should be noted in this context that it is correct that constitutional motions have been deemed by the Committee not to provide an available and effective remedy which an author must first exhaust, but that this has been the case only where the authors have had no means of their own and have not been entitled to obtain legal aid from the State party. Therefore, if the author is given such assistance ex gratia in the case, he will be in a position to seek a review of his grievances under the constitutional motions procedure, thereby making this remedy available and effective.

We thus are of the opinion that the author should be afforded the possibility of pursuing a constitutional motion by assigning to him legal aid for the purpose, so as to enable him to seek effective redress for the violations suffered.

[Done in English, French, Russian and Spanish, the English text being the original version.]

O. Communication No. 356/1989, Trevor Collins v. Jamaica
(views adopted on 25 March 1993, forty-seventh session)*

Submitted by: Trevor Collins (represented by counsel)

Alleged victim: The author

State party: Jamaica

Date of communication: 17 April 1989

Date of decision on admissibility: 17 October 1989

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1993,

Having concluded its consideration of communication No. 356/1989, submitted to the Human Rights Committee by Trevor Collins under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Trevor Collins, a Jamaican citizen awaiting execution at St. Catherine District Prison, Spanish Town, Jamaica. He claims to be a victim of violations by Jamaica of article 14, paragraphs 2 and 3 (b) to (e), of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 The author was accused, jointly with a co-defendant, Paul Kelly, a/ of the murder, on 2 July 1981, of one O. V. Jamieson. His trial took place in the Westmoreland Circuit Court from 9 to 15 February 1983; he and Mr. Kelly were found guilty as charged and sentenced to death. On 23 February 1983, the author appealed to the Court of Appeal of Jamaica. On 28 April 1986 the Court of Appeal, treating the application for leave to appeal as the hearing of the appeal itself, dismissed the appeal. The Court of Appeal did not issue a reasoned judgement but merely an oral judgement. Because of the absence of a reasoned appeal judgement, the author has not petitioned the Judicial Committee of the Privy Council for special leave to appeal.

2.2 The body of the deceased was discovered on 2 July 1981 in bushes near the road of Lennox Bigwoods. The previous day, the author and Mr. Kelly had sold a cow to one Basil Miller. The prosecution contended that the cow had been stolen

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* Pursuant to rule 85 of the Committee's rules of procedure, Committee member Mr. Laurel Francis did not take part in the adoption of the Committee's views.

from Mr. Jamieson, who had visited Mr. Miller's home in the evening of 1 July 1981 and identified the cow as his property. The accused allegedly ambushed Mr. Jamieson on his way home and beat him to death, as they believed that he had obtained from Mr. Miller the receipt implicating them in the theft of the cow. The author then allegedly threw his blood-stained clothes into a latrine next to his home and went to Kingston. Mr. Collins contests this version of the facts; he argues that he had obtained the cow from one Alvin Spence, and that he and his co-defendant arrived in Kingston several hours before the crime was committed.

2.3 The author notes that there were no witnesses to the crime, nor any forensic evidence which would have linked him to the deceased. Accordingly, the prosecution relied on circumstantial evidence, i.e. the blood-stained clothes found close to the author's home, the presence of a motive and the testimony of Mr. Kelly's sister and the author's brother, which conflicted with the version put forward by the accused. It further relied on confessions allegedly obtained from the accused upon their arrest; although the latter contended that the confessions were made under duress, the judge ruled them admissible. The author's appeal to the Court of Appeal was filed on the following grounds: (a) that the trial was unfair; (b) that there was insufficient evidence to warrant a conviction and (c) that the prosecution's evidence was contradictory.

Complaint

3.1 The author submits that the delay of over three years in the determination of his appeal by the Jamaican Court of Appeal violates his right, under article 14, paragraph 3 (c), to be tried "without undue delay". He further claims that he was effectively unrepresented before the Court of Appeal, as his court-appointed representative merely stated that he found no merits in arguing the appeal.

3.2 It is submitted that the author's trial in the Westmoreland Circuit Court violated article 14, paragraph 3 (b), (d) and (e) and, as a result, the presumption of innocence of article 14, paragraph 2. In this context, counsel points out that the trial transcript reveals that no witnesses were called on the author's behalf although he had asked for witnesses to be called, that no evidence was adduced either in support of his alibi that he had left Westmoreland for Kingston several hours before the crime, nor in support of the claim that the cow Mr. Collins had sold to Basil Miller had been given to him by Mr. Spence. These points are said to indicate that the author's representation during the trial was seriously deficient. Counsel adds that legal aid provided by the State party is such that it is all but impossible for any defendant's case to be properly prepared and/or for witnesses to be traced, as would be appropriate in a capital case.

3.3 With respect to the requirement of exhaustion of domestic remedies, the author notes that senior counsel instructed on his behalf advised there were no grounds upon which a petition for special leave to appeal to the Judicial Committee of the Privy Council could justifiably be filed. He had further suggested that the Jamaican Constitutional Court and the Court of Appeal would consider themselves bound by the decision of the Judicial Committee of the Privy Council in the case of Riley et al. v. Attorney General of Jamaica, and that no decision in the case could be taken unless and until a petition to the Judicial Committee were allowed or decided upon. Accordingly, the process of exhaustion of domestic remedies under the Jamaican Constitution and, thereafter, to the Judicial Committee would take several years. Counsel thus concludes that

available and effective remedies have been exhausted. He adds that the application of domestic remedies has already been unreasonably prolonged, as the author has been detained on death row for close to 10 years.

State party's information and observations

4. The State party argues that the author retains the right, under Section 110 of the Jamaican Constitution, to petition the Judicial Committee of the Privy Council for special leave to appeal. It adds that the rights protected by article 14, paragraphs 2 and 3, are coterminous with those protected under Section 20 of the Jamaican Constitution. Under Section 25, the author could seek enforcement of his constitutional rights before the Supreme (Constitutional) Court. The State party notes that the author has failed to seek constitutional redress.

Committee's decision on admissibility and the State party's challenge thereof

5.1 During the thirty-seventh session, the Committee considered the admissibility of the communication. With respect to the requirement of exhaustion of domestic remedies, it noted that the Court of Appeal of Jamaica had not issued a written judgement in the case, the submission of which to the Judicial Committee could be considered a prerequisite for a petition for special leave to appeal to be entertained. In the circumstances, counsel could objectively assume that any petition for leave to appeal would fail, on account of the unavailability of a written judgement from the Court of Appeal. The Committee recalled that domestic remedies need not be exhausted if there are serious reasons for believing that they have no real prospect of success. On the basis of the information before it, it concluded that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

5.2 On 17 October 1989, accordingly, the Committee declared the communication admissible.

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party challenges the Committee's findings and reiterates that the author still has criminal remedies (before the Judicial Committee of the Privy Council) and constitutional remedies (before the Constitutional Court) which he is required to pursue. It adds that there are no grounds which would relieve Mr. Collins from his obligation to pursue these remedies, and that such delays as occurred in the proceedings cannot be attributed to the judicial authorities. Accordingly, there is no basis for the assertion that the application of domestic remedies has been unreasonably prolonged.

6.2 Still in the context of exhaustion of domestic remedies, the State party observes that the Privy Council Rules do not make a written judgement of the Court of Appeal a prerequisite for a petition for special leave to appeal:

> "Rule 4 provides that a petitioner for special leave to appeal lodge the judgment from which special leave to appeal is sought. However, 'judgment' is defined in Rule 1 as including 'decree, order, sentence or decision of any court, judge or judicial officer'. Thus the order or decision of the Court of Appeal in respect of a particular appeal, as distinct from the written judgment, is a sufficient basis for a petition for special leave to appeal to the Privy Council, and in practice the Privy Council has heard appeals on the basis of the order or decision of the Court of Appeal dismissing the appeal."

6.3 Finally, the State party contends that the facts relied upon by counsel to substantiate the author's allegations under article 14, paragraphs 2 and 3, do not disclose any breaches attributable to the Government. To the extent that the claims involve issues of evaluation of evidence, the State party maintains that the Committee is not competent to consider those issues.

Review of admissibility

7.1 The Committee has taken note of the State party's submission of 8 May 1990, which challenges the admissibility decision of 17 October 1989. It takes the opportunity to expand on its admissibility findings. The State party has argued that the Judicial Committee of the Privy Council may hear a petition for special leave to appeal even in the absence of a written judgement of the Court of Appeal; it bases itself on its interpretation of Rule 4 juncto Rule 1 of the Privy Council's Rules of Procedure. While the Judicial Committee's rules of procedure do not exclude this reasoning, it fails to take into account that, for purposes of the Optional Protocol, a judicial remedy must not only be available in theory but also be effective, that is, have a reasonable prospect of success. It is true that the Judicial Committee has heard several petitions concerning Jamaica in the absence of a written judgement of the Court of Appeal, but, on the basis of the information available to the Committee, all of these petitions were dismissed because of the absence of such a judgement. In this respect, therefore, there is no reason to reverse the Committee's admissibility decision.

7.2 Similar considerations apply to the possibility of instituting constitutional remedies before the Supreme (Constitutional) Court. This issue has already been examined by the Committee in its views on communications 230/1987 (Raphael Henry v. Jamaica) and 283/1988 (Aston Little v. Jamaica). b/ In the circumstances of these communications, the Committee concluded that a constitutional motion did not constitute an available and effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

7.3 The Committee further notes that the State party does not provide legal aid for constitutional motions; as the author is unable to secure private legal representation for this purpose, it concludes that such a motion would not constitute a remedy which the author would be required to exhaust for purposes of the Optional Protocol, and that there is no reason to reverse the decision of 17 October 1989.

7.4 With regard to the author's contention that he was forced to confess his guilt, contrary to article 14, paragraph 3 (g), of the Covenant, the Committee notes that this claim was not submitted to the Committee until almost three years after the Committee's decision to declare the communication admissible. In the circumstances, the Committee does not admit this claim for consideration on the merits.

Examination of the merits

8.1 In respect of the author's claims under article 14, paragraph 3 (b) and (e), the Committee reiterates that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and an important aspect of the principle of equality of arms. Wherever a capital sentence may be pronounced on the accused, it is imperative that sufficient time must be granted to the accused and his counsel to prepare their defence. The determination of what constitutes "adequate time" requires an assessment of the individual

circumstances of each case. The author also contends that he could not obtain the attendance of witnesses. The material before the Committee does not disclose, however, whether either counsel or the author himself complained to the trial judge that the time or facilities for the preparation of the defence had been inadequate. Furthermore, there is no indication that counsel's decision not to call witnesses was not in the exercise of his professional judgement, or that, if a request to call witnesses was made, the judge disallowed it. Accordingly, there is no basis for a finding of a violation of article 14, paragraph 3 (b) and (e).

8.2 As to the author's legal representation before the Court of Appeal, the Committee reaffirms that it is axiomatic that legal assistance be made available to a convicted prisoner under sentence of death. This applies to all stages of the judicial proceedings. Counsel was entitled to recommend that an appeal should not proceed. But if the author insisted upon the appeal, counsel should have continued to represent him or, alternatively, Mr. Collins should have had the opportunity to retain counsel at his own expense. In this case, it is clear that legal assistance was assigned to Mr. Collins for the appeal. What is at issue is whether counsel had a right to effectively abandon the appeal without prior consultation with the author. Counsel indeed opined that there was no merit in the appeal, thus effectively leaving Mr. Collins without legal representation. While article 14, paragraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue, before the appellate instance, that the appeal has no merit.

8.3 Finally, because of the absence of a written judgement of the Court of Appeal, the author has been unable to effectively petition the Judicial Committee of the Privy Council. This, in the Committee's opinion, entails a violation of article 14, paragraph 3 (c), and article 14, paragraph 5. The Committee reaffirms that in all cases, and especially in capital cases, the accused is entitled to trial and appeal proceedings without undue delay, whatever the outcome of the judicial proceedings may turn out to be. c/

8.4 The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6 (16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal". In the present case, while a petition for special leave to appeal is in theory still available, it would not be an available remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol (see para. 7.1 above). Accordingly, it must be concluded that the final sentence of death was passed without having met the requirements of article 14, and that as a result, the right protected by article 6 of the Covenant has been violated.

9. The Human Rights Committee, acting under article 5. paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights,

finds that the facts before it disclose violations of articles 6 and 14, paragraphs 3 (c), (d) and 5, of the Covenant.

10. The Committee is of the view that Mr. Trevor Collins is entitled to a remedy entailing his release. It requests the State party to provide information, within ninety days, on any relevant measures taken by the State party in compliance with the Committee's views.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ The Committee adopted its views on Mr. Kelly's communication on 8 April 1991, finding violations of articles 6, 9, 10 and 14 of the Covenant, and requested the State party to release Mr. Kelly; see communication No. 253/1987.

b/ Communication No. 230/1987, views adopted on 1 November 1991, paras. 7.1 to 7.5; communication No. 283/1988, views adopted on 1 November 1991, paras. 7.1 to 7.6.

c/ See views on communication No. 253/1987 (Paul Kelly v. Jamaica), adopted on 8 April 1991, para. 5.12.

P. Communications Nos. 359/1989 and 385/1989, John Ballantyne and Elizabeth Davidson, and Gordon McIntyre v. Canada (views adopted on 31 March 1993, forty-seventh session)

Submitted by: John Ballantyne and Elizabeth Davidson, and Gordon McIntyre

Alleged victims: The authors

State party: Canada

Date of communications: 10 April and 21 November 1989 (initial submissions)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1993,

Having concluded its consideration of communication No. 359/1989 submitted to the Human Rights Committee by J. Ballantyne and E. Davidson, and of communication No. 385/1989 submitted by G. McIntyre under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communications, and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.*

1. The authors of the communications (initial submissions dated 10 April 1989 and 21 November 1989 and subsequent correspondence) are John Ballantyne, Elizabeth Davidson and Gordon McIntyre, Canadian citizens residing in the Province of Quebec. The authors, one a painter, the second a designer and the third an undertaker by profession, have their businesses in Sutton and Huntingdon, Quebec. Their mother tongue is English, as is that of many of their clients. They allege to be victims of violations of articles 2, 19, 26 and 27 of the International Covenant on Civil and Political Rights by the Federal Government of Canada and by the Province of Quebec, because they are forbidden to use English for purposes of advertising, e.g., on commercial signs outside the business premises, or in the name of the firm.

Facts as submitted

2.1 The authors of the first communication (No. 359/1989), Mr. Ballantyne and Ms. Davidson, sell clothes and paintings to a predominantly English-speaking clientele, and have always used English signs to attract customers.

2.2 The author of the second communication (No. 385/1989), Mr. McIntyre, states that in July 1988, he received notice from the Commissioner-Enquirer of the "Commission de protection de la langue française" that following a "check-up" it

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* Five concurring and dissenting opinions, signed by eight Committee members, are appended to the present document.

had been ascertained that he had installed a sign carrying the firm name "Kelly Funeral Home" on the grounds of his establishment, which constituted an infraction of the Charter of the French Language. He was requested to inform the Commissioner within 15 days in writing of measures taken to correct the situation and to prevent the recurrence of a similar incident. The author has since removed his company sign.

2.3 Mr. McIntyre's business was established over 100 years ago and in the 25 years under his management has always operated without language constraints. Now he is allegedly disadvantaged vis-à-vis French speaking competitors who are allowed to use their mother tongue without restriction. Of the seven funeral homes in the area, his is the only one operated by an English-speaking Canadian serving the English-speaking community. Out of a total population of 15,600 in the town in question, some 5,600 inhabitants speak English. Bill No. 178, however, prevents him from indicating in his commercial sign in English the service he provides. The author alleges a loss of business and a reduced impact on passers-by, who no longer identify his services by an external sign.

2.4 Mr. McIntyre also claims that since he has "taken on the Government" a certain "fear factor" discourages potential clients. It leads to hate calls, threats and ridicule in the press by suggestions that he is a "racist".

Complaint

3.1 The authors challenge sections 1, 6 and 10 of Bill No. 178 enacted by the Provincial Government of Quebec on 22 December 1988, with the purpose of modifying Bill No. 101, known as the Charter of the French Language (Charte de la langue française). The ratio legis of Bill No. 178, as stated explicitly by the Quebec legislature, was to override two judgements rendered by the Supreme Court of Canada on 15 December 1988, declaring several sections of the Charter unconstitutional. The official explanatory note preceding the text of the Charter states that only French may be used in public bill-posting and in commercial advertising outdoors. It stipulates that this rule shall also apply inside means of public transport and certain establishments, including shopping centres. The authors claim to be personally affected by the application of Bill No. 178.

3.2 The authors furthermore claim that the "notwithstanding" clause contained in section 10 of Bill No. 178 overrides the safeguards contained in the Canadian Charter of Human Rights and Freedoms (Canadian Charter) and the Quebec Charter of Human Rights and Freedoms (Quebec Charter). They point out that section 33 of the Canadian Charter, and its counterpart section 52 of the Quebec Charter, allow for the suspension of protection against human rights violations.

3.3 The authors claim that these provisions, whenever applied, violate Canada's obligations under the Covenant, in particular article 2. Exempting legislation from compliance with the provisions of the Canadian or Quebec Charters of Human Rights and Freedoms effectively denies a remedy to citizens whose rights have been or are being violated by the legislation thus exempted.

Legislative provisions

4.1 The relevant original provisions of the Charter of the French language (Bill No. 101, S.Q. 1977, C-5) have been modified several times. In essence, however, they have remained substantially the same. In 1977, section 58 read as follows:

"Except as may be provided in this Act or the regulations of the Office de la langue française, signs and posters and commercial advertising shall be solely in the official language."

4.2 The original wording of section 58 was replaced in 1983 by section 1 of the Act to amend the Charter of the French Language (S.Q. 1983, C-56) which read:

"58. Public signs and posters and commercial advertising shall be solely in the official language.

"Notwithstanding the foregoing, in the cases and under the conditions or circumstances prescribed by regulation of the Office de la langue française, public signs and posters and commercial advertising may be both in French and another language or solely in another language ...".

4.3 The initial language legislation was struck down by the Supreme Court in La Chaussure Brown's Inc. et al. v. the Attorney General of Quebec (1989) 90 N.R. 84. Following this, section 58 of the Charter was amended by section 1 of Bill No. 178. While certain modifications were made relating to signs and posters inside business premises, the compulsory use of French in signs and posters outside remained.

4.4 Section 58 of the Charter, as modified in 1989 by section 1 of Bill No. 178, now reads:

"58. Public signs and posters and commercial advertising, outside or intended for the public outside, shall be solely in French. Similarly, public signs and posters and commercial advertising shall be solely in French,

"1. Inside commercial centres and their access ways, except inside the establishments located there;

"2. Inside any public means of transport and its access ways;

"3. Inside the establishments of business firms contemplated in section 136;

"4. Inside the establishments of business firms employing fewer than fifty but more than five persons, where such firms share, with two or more other business firms, the use of a trademark, a firm name or an appellation by which they are known to the public.

"The Government may, however, by regulation, prescribe the terms and conditions according to which public signs and posters and public advertising may be both in French and in another language, under the conditions set forth in the second paragraph of section 58.1, inside the establishments of business firms contemplated in subparagraphs 3 and 4 of the second paragraph.

"The Government may, in such regulation, establish categories of business firms, prescribe terms and conditions which vary according to the category and reinforce the conditions set forth in the second paragraph of section 58.1."

4.5 Section 6 of Bill No. 178 modified section 68 of the Charter, which now reads:

> "68. Except as otherwise provided in this section, only the French version of a firm name may be used in Quebec. A firm name may be accompanied with a version in another language for use outside Quebec. That version may be used together with the French version of the firm name in the inscriptions referred to in section 51, if the products in question are offered both in and outside Quebec.
>
> "In printed documents, and in the documents contemplated in section 57 if they are both in French and in another language, a version of the French firm name in another language may be used in conjunction with the French firm name.
>
> "When texts or documents are drawn up in a language other than French, the firm name may appear in the other language without its French version.
>
> "On public signs and posters and in commercial advertising,
>
> "1. A firm name may be accompanied with a version in another language, if they are both in French and in another language;
>
> "2. A firm name may appear solely in its version in another language, if they are solely in a language other than French."

4.6 Section 10 of Bill No. 178 contains a so-called "notwithstanding" clause, which provides that:

> "The provisions of section 58 and of the first paragraph of section 68, brought into effect under sections 1 and 6 respectively of the present Bill, shall operate irrespective of the provisions of section 2, paragraph (b), and section 15 of the Constitutional Act of 1982 ... and shall apply notwithstanding articles 3 and 10 of the Charter of Human Rights and Freedoms."

4.7 Another "notwithstanding" provision is incorporated into section 33 of the Canadian Charter of Human Rights and Freedoms, which reads:

> "1. Parliament or the legislature of a province may expressly declare in an act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> "2. An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> "3. A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> "4. Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

"5. Subsection (3) applies in respect of a re-enactment made under subsection (4)."

State party's observations

5.1 The communications were transmitted to the State party under rule 91 of the rules of procedure on 26 May 1989 and 29 January 1990. The deadlines for observations was set for 26 July 1989 and 29 March 1990, respectively. On several occasions, the State party requested an extension of time to make its submission, explaining that it needed more time as the issues involved were factually and legally complex and concerned both federal and provincial areas of legislative competence.

5.2 In its submission of 28 December 1990, the State party objected to the admissibility of the communications under article 5, paragraph 2 (b), of the Optional Protocol to the International Covenant on Civil and Political Rights. It argued that domestic remedies had not been exhausted, since the authors had made no attempt to challenge Bill No. 178 and to "seek redress from the Canadian courts or other bodies that may be competent to resolve the issue pursuant to Canadian law".

5.3 The State party also stated that in at least two legal proceedings before the courts of Quebec, litigants were challenging this legislation. K.N., charged on 30 January 1990 on two counts of contravening the Charter of the French Language, was scheduled to appear before the Court of Quebec on 19 December 1990, when the trial date was to have been set. In another case pending before the Court of Quebec, H.S. was charged in June 1990 on two counts of contravening the Charter by displaying a welcome sign outside his bakery in 35 languages. The respondent was scheduled to appear in court on 28 February 1991.

5.4 The State party further submitted that Quebec law provides the possibility for the authors to test the constitutional validity or application of Bill No. 178 through the use of an application for a declaratory judgement and referred to national jurisprudence in which certain provisions of the Charter of the French Language were declared to be of no force or effect.

5.5 The State party also pointed to the availability of the Federal Court Challenges Programme, which alleviates the financial hardship associated with the conduct of such litigation and states that the legal issues raised would be within the scope of the programme and the authors could, therefore, seek funding from the programme for the purpose of contesting the restrictions imposed by the provincial law.

Exhaustion of domestic remedies

6.1 With respect to the requirement of exhaustion of domestic remedies, the authors maintain that following the enactment of Bill No. 178 there are no effective remedies which they could pursue. They refer to the relevant judgements of the Superior Court to the District of Montreal, the Appeal Court and the Supreme Court of Canada.

6.2 In particular, the authors of the first communication claim that because Bill 178 applies in spite of Canadian human rights laws and because the notwithstanding clauses of the Canadian and Quebec Charters, when invoked, suspend human rights as guaranteed, inter alia, by international human rights

norms, they are denied an effective remedy within the meaning of article 2, paragraph 3, of the Covenant.

6.3 With regard to steps taken to assert their rights, the authors refer to numerous letters addressed to various provincial and federal authorities by individuals and lobby groups with no effect. As to judicial remedies, the authors explain that the Supreme Court's decision in La Chaussure Brown's et al., which supports their plea, has no effect in view of the subsequent Quebec legislation which makes any further challenge of section 1 of Bill No. 178 futile.

6.4 As to the possibility of initiating proceedings for a declaratory judgement, the authors contend that the very existence of the "notwithstanding" clause renders Bill No. 178 immune to challenge.

6.5 Mr. McIntyre states that he has written to the Prime Minister of Canada, the leaders of the Opposition, members of the Senate of Canada and the premiers of all provinces, only to receive a number of replies that express various forms of support and indicate that Bill No. 178 indeed violates the right to freedom of expression and runs contrary to both the Canadian and Quebec Charters of Human Rights. As a member of the Chateauguay Valley English Speaking People's Association, he helped to organize a demonstration in Ottawa and to circulate a petition, which gathered some 10,000 signatures and was subsequently sent to the Secretary-General of the United Nations.

6.6 In a case submitted by other complainants, the Superior Court held, on 28 December 1984, that section 58 of the Charter of the French Language, in so far as it prescribed that public signs and posters and commercial advertising shall be solely in French, was inoperative from 1 February 1984.

6.7 The Court of Appeal upheld the judgement and allowed an appeal declaring Section 68 of the Charter, in so far as it prescribed that only the French version of a firm name is to be used, to be inoperative from 1 January 1986 by reason of the Quebec Charter of Human Rights and Freedoms and from 17 April 1982 by reason of the Canadian Charter of Rights and Freedoms.

6.8 The authors argue that both the Quebec and federal courts have thoroughly considered the implications of the challenged provisions and that they have found them in violation of relevant constitutional provisions. The authors stress that while recognizing that there are reasonable limits to the exercise of human rights, the courts have held that the prohibition of the use of any other language than French in commercial signs was neither an appropriate nor a justifiable remedy against threats to the French culture. In particular, they found that the obligation to use only French on commercial signs and in advertising violated the right of freedom of expression and constituted discrimination based on language.

6.9 The authors argue that the Supreme Court's judgement in the La Chaussure Brown's et al. case directly applies to their situation. Bill No. 178, however, overrides the Court's judgement and operates notwithstanding section 2 (b) (freedom of expression) and section 15 (equality) of the Canadian Charter. The authors contend that it would be futile to go to the courts in view of the certain application of the "notwithstanding" clauses of the Canadian or Quebec Charters.

6.10 In addition, the authors complain that the Federal Government of Canada has not used its constitutional authority under section 90 of the Constitution Act, 1867, to disallow or set aside a Bill of a provincial government allowing fundamental human rights to be disregarded.

Committee's decision to join consideration of the communications and to declare them admissible

7.1 Pursuant to rule 88, paragraph 2, of its rules of procedure, the Committee joined consideration of the two communications at its fortieth session in October 1990.

7.2 During its forty-first session in April 1991, the Committee considered the admissibility of the communications. It disagreed with the State party's contention that there were still effective remedies available to the authors in the circumstances of their cases. In this context, it noted that in spite of repeated legislative changes protecting the visage linguistique of Quebec, and despite the fact that some of the relevant statutory provisions had been declared unconstitutional successively by the Superior, Appeal and Supreme Courts, the only effect of this had been the replacement of these provisions by ones that are the same in substance as those they replaced, but reinforced by the "notwithstanding" clause of Section 10 of Bill 178.

7.3 As to the State party's contention that Bill 178 can be and is being challenged before the Quebec courts, the Committee noted that the issues raised in the cases before the local courts were not the same as those before the Committee and thus could not bear upon whether the authors of the communications still had remedies to pursue. The Committee further noted that the "notwithstanding" clause, which is not applicable to the provision(s) at issue in the proceedings referred to by the State party, remained applicable to Section 58 of Bill 178, the provision at issue in the communications before the Committee. It therefore concluded that no effective remedy was available to the authors in respect of their claim.

7.4 On 11 April 1991, therefore, the Committee declared the communications admissible.

State party's request for a review of admissibility and submission on the merits: authors' comments thereon

8.1 In a submission dated 6 March 1992, the Federal Government requests the Committee to review its decision on admissibility. It notes that the number of litigants who contest the validity of Bill 178 has grown, and that hearings before the Court of Quebec on the issue were held on 14 January 1992. The proceedings continue, and lawyers for the provincial government were scheduled to present Quebec's point of view on 23 and 24 March 1992.

8.2 The State party contends that Quebec's Code of Civil Procedure entitles the authors of the communications to apply for a declaratory judgement that Bill 178 is invalid and adds that this option would be open to them regardless of whether criminal charges had been instituted against them or not. It argues that consistent with the well-established principle that effective domestic remedies must be exhausted before the jurisdiction of an international body is engaged, Canadian courts should have an opportunity to rule on the validity of Bill 178, before the issue is considered by the Human Rights Committee.

8.3 The State party further argues that the "notwithstanding" clause in Section 33 of the Canadian Charter of Rights and Freedoms is compatible with Canada's obligations under the Covenant, in particular with article 4 and with the obligation, under article 2, to provide its citizens with judicial remedies. It explains that, firstly, extraordinary conditions limit the use of Section 33. Secondly, Section 33 is said to reflect a balance between the roles of elected representatives and courts in interpreting rights: "A system in which the judiciary is given full and final say on all issues of rights adversely impacts on a key tenet of democracy - that is, participation of citizens in a forum of elected and publicly accountable legislatures on questions of social and political justice ... The 'notwithstanding' clause provides a limited legislative counterweight in a system which otherwise gives judges final say over rights issues."

8.4 Lastly, the Government affirms that the existence of Section 33 per se is not contrary to article 4 of the Covenant, and that the invocation of Section 33 does not necessarily amount to an impermissible derogation under the Covenant: "Canada's obligation is to ensure that Section 33 is never invoked in circumstances which are contrary to international law. The Supreme Court of Canada has itself stated that 'Canada's international human rights obligations should [govern] ... the interpretation of the content of the rights guaranteed by the Charter'." Thus, a legislative override could never be invoked to permit acts clearly prohibited by international law. Accordingly, the legislative override in Section 33 is said to be compatible with the Covenant.

8.5 In another submission, made through the Federal Government of Canada, the provincial government of Quebec contends that the communications under review do not reveal a breach of articles 2, 19, 26 or 27 by Quebec. As regards article 27, Quebec asserts that historical developments since 1763 amply bear out the need for French speakers to seek protection of their language and culture. Even if it were concluded that the dominant position of English speakers in Canada did not prevent the authors from invoking article 27 of the Covenants, its travaux préparatoires indicate that its aim was rather to protect specific linguistic rights, in particular in the spheres of education, justice, public administration and cultural and religious institutions:

> "Accordingly, this article may not be invoked in support of the complainants' claims because, even if it applied to them, the right to commercial advertising and the right to use the business names they wish to include in the advertising do not come within its scope, ratione materiae. Consequently, the claims ... are incompatible with the provisions of the Covenant."

8.6 In respect of the authors' claims under article 26, the Government of Quebec points out that Sections 58 and 68 of the Charter of the French Language, as amended by Sections 1 and 6 of Bill 178, are general measures applicable to commercial advertising which lay down the same requirements and obligations for all tradesmen, regardless of their language. They treat equally all people who seek to advertise in Quebec. The authors of the communications have provided no evidence to show that they were treated differently from other tradesmen, or that the turnover of their businesses declined as a result of the adoption and application of Bill 178.

8.7 The Government of Quebec points out that in the linguistic sphere, the notion of de facto equality precludes purely formal equality and makes it necessary to accord different treatment in order to arrive at a result that

restores the balance between different situations. It contends that the Charter of the French Language, as amended by Bill 178, "is a measured legislative response to the particular circumstances of Quebec's society, for which, in the North American context and in the face of the domination of the English language and the ensuing cultural, socio-economic and political pressures, 'francification' ('Frenchification') is still in an exposed position".

8.8 The requirements of Sections 58 and 68 of Bill 178 are said to be deliberately limited to the sphere of external public and commercial advertising, because it is there that the symbolic value of the language as a means of collective identification is strongest and contributes most to preserving the cultural identity of French speakers: "the linguistic image communicated by advertising is an important factor that contributes to shaping habits and behaviour which perpetuate or influence the use of a language". Quebec concludes on this point that Bill 178 strikes a delicate balance between two linguistic communities, one of which is in a dominant demographic position both nationally and on the continent as a whole. This aim is said to be reasonable and compatible with article 26 of the Covenant.

8.9 In respect of the authors' claim under article 19, the Government of Quebec submits that the alleged violation does not come, ratione materiae, within the scope of application of article 19. In its opinion, "freedom of expression as referred to by the Covenant primarily concerns political,cultural and artistic expression and does not extend to the area of commercial advertising. Thus there are no grounds in article 19 of the Covenant for the allegations made by the authors ..." Quebec adds that the historical background and the fact that the evolution of linguistic relations in Canada constitutes a political compromise do not justify the conclusion that the requirement to carry out external commercial advertising in a certain way amounts to a violation of article 19:

> "Even if this were not the case, freedom of expression in commercial advertising requires lesser protection than that afforded to the expression of political ideas, and the Government must be allowed a large measure of discretion to achieve its objectives."

8.10 The Government of Quebec concludes that the right to commercial outdoor advertising in a language of the authors' choice "is not protected by any of the provisions of the Covenant and, even if such a right was implicitly provided for therein, the Charter of the French Language, as amended by Bill 178, in terms of any possible infringement of such a right, is reasonable and designed to achieve objectives compatible with the Covenant". In any event, the Charter of the French Language, as amended by Bill 178, may provide Quebec with a means of preserving its specific linguistic character and give French speakers a feeling of linguistic security.

9.1 In their comments on the above submissions, the authors of communication 359/1989 deny the existence of effective domestic remedies. They contend that "simply put, the 'notwithstanding' clause automatically renders all domestic remedies exhausted because there is no recourse available to plead human rights violations". They note that the defence arguments in the cases currently pending before the Quebec courts are not based on Sections 2 (b) and 15 of the Canadian Charter or Sections 3 and 10 of the Quebec Charter, which guarantee freedom of expression and protection against discrimination based on language. In the La Chaussure Brown's et al. judgement, the Supreme Court struck down basically the same legislation as a violation of the aforementioned guarantees.

Because of the "notwithstanding" clause in Section 10 of Bill 178, the authors argue, they are precluded from even asking the Court to consider whether the law runs counter to the Charter guarantees of freedom of expression and protection against discrimination.

9.2 The authors contend that the same logic applies to the Government's suggestion that they seek a declaratory judgement: "Indeed the La Chaussure Brown's et al. decision has already ... decided that the law violates human rights. The point is ... that Bill 178 operates 'notwithstanding' the Charters, so that the Court could not consider such a question on its merits." In this context, the authors further point out that under Canadian law, they are unable to invoke the provisions of the Covenant before the domestic courts.

9.3 The authors reject the Federal Government's arguments on the application and limitations on Section 33 of the Canadian Charter as devoid of any basis in reality. They argue that any attempt to minimize the impact or emphasize the difficulty in applying the "notwithstanding" clause must fail when one considers the ease with which Quebec was able to implement the "Loi concernant la Loi Constitutionnelle de 1982", and the effects this has had in terms of curtailing the protection afforded by the Canadian Charter. Furthermore, the speed with which Bill 178 was enacted - one week after the Supreme Court's decision in La Chaussure Brown's et al. - belies the contention that the "notwithstanding" clause is subject to extraordinary limitations or is only applied in rare circumstances.

9.4 The authors dismiss the argument that the "notwithstanding" clause strikes a "delicate balance" between the power of the legislative authorities and the judiciary. They affirm that Section 1 of the Canadian Charter already provides such a balance by subjecting human rights to such reasonable limits prescribed by law which are justified in a free and democratic society. Section 9(1) of the Quebec Charter contains limitations to the same effect. In the authors' opinion, there is no justification, political expediency apart, for the presence of the "notwithstanding" clauses.

9.5 Finally, the authors reject the affirmation that the "notwithstanding" clauses are compatible with Canada's international human rights obligations. Thus, the overriding provision of Bill No. 178 can be maintained only because of the existence of these clauses. The authors submit that Canada has failed to take all necessary steps to comply with its obligations under the Covenant and the Optional Protocol.

9.6 In a further comment, counsel to Mr. McIntyre reiterates that Bill No. 178 violates fundamental rights protected by the Covenant. He argues that while Quebec has pointed to figures which show a slow decline in the use of French across Canada, it omitted to point out that, in Quebec, French has been gaining ground on English and the English community is in decline. Furthermore, while Quebec has portrayed the 1982 constitutional amendments as an attack on the French language, it can on the contrary be argued that Section 23 of the amended Charter of Rights and Freedoms has been particularly effective in assisting the francophone population outside Quebec.

9.7 Counsel to Mr. McIntyre dismisses Quebec's view that the English minority is particularly well-treated as "highly tendentious". On the contrary, he argues, this minority has been subjected to "systematic discouragement" since 1970, a conclusion endorsed by the Supreme Court of Canada in the case of Quebec Association of Protestant School Boards v. A.G. Qué. (1984). Furthermore,

although French minorities in the rest of Canada have often been treated unfairly in the past, this situation is now improving. As a result, counsel denies that historical or legal arguments would justify the restrictions imposed by Bill No. 178 in the light of articles 19, 26 or 27 of the Covenant.

9.8 Counsel contends that in respect of the causal connection between the language of outdoor commercial advertising and the perceived threat to the survival of French, Quebec merely tries to reargue its unsuccessful defence in the case of La Chaussure Brown's et al. He reiterates that there is no connection between the contested legislative provisions and any rational defence or protection of the French language.

9.9 Counsel asserts that in respect of the alleged violation of the right to freedom of expression, there is no reason to exclude commercial expression from protection. Any distinction between commercial and non-commercial expression would be difficult to operate, and, moreover, the notion of freedom of expression has been interpreted in a broad and liberal manner by the Supreme Court of Canada in recent years.

9.10 Finally, in respect of Section 33 of the Canadian Charter, counsel contends that since the rights to freedom of expression and protection from discrimination are protected under the Covenant, Section 33 cannot be used as a tool which would render these rights inoperative: "Section 33, while not invalid ab initio, is inoperative with regard to these rights which Canada is under an international obligation to uphold".

Review of admissibility

10.1 The Committee has taken note of the parties' comments, made subsequent to the decision on admissibility, in respect of the admissibility and the merits of the communications. It takes the opportunity to explain its admissibility findings.

10.2 The State party has contended that as the issue of the validity of Bill No. 178 is before the Quebec courts and the authors may apply for a declaratory judgement that the Bill is invalid, the communications remain inadmissible. The Committee notes that the State party has not replied to the argumentation set out in its decision on admissibility, as reflected in paragraphs 7.2 and 7.3 above. From the State party's submission, it further appears that the cases pending before the courts of Quebec concern the offence provisions of Bill 178 and not the "notwithstanding" clause in Section 10 thereof, nor Section 33 of the Canadian Charter and Section 52 of the Quebec Charter. This clause remains applicable to Section 58 of the Charter of the French Language, as amended by Section 1 of Bill 178. Any challenge of Section 58 based on alleged violations of fundamental freedoms is therefore bound to fail.

10.3 It remains to be determined whether a declaratory judgement declaring Bill No. 178 invalid would provide the authors with an effective remedy. The Committee notes that such a judgement would still leave the Charter of the French Language operative and intact, and enable the Quebec legislature to override any such judgement by replacing the provisions struck down by others substantially the same and by invoking the "notwithstanding" clause of the Quebec Charter. On the basis of precedent, and in the light of the legislative history of Bill 178, such a course of action is not merely hypothetical. The net result, a continued ban on languages other than French in outdoor advertising, would remain the same. Furthermore, a declaratory judgement would

not pronounce on the compatibility, with international obligations assumed by Canada, of the "notwithstanding" clauses cited above.

10.4 The Committee has further reconsidered, eo volonte, whether all the authors are properly to be considered victims within the meaning of article 1 of the Optional Protocol. In that context, it has noted that Mr. Ballantyne and Ms. Davidson have not received warning notices from the Commissioner-Enquirer of the "Commission de protection de la langue française" nor been subjected to any penalty. However, it is the position of the Committee that where an individual is in a category of persons whose activities are, by virtue of the relevant legislation, regarded as contrary to law, they may have a claim as "victims" within the meaning of article 1 of the Optional Protocol.

10.5 In the light of the above, the Committee sees no reason to review its decision on admissibility of 11 April 1991.

Consideration of the merits

11.1 On the merits, three major issues are before the Committee:

(a) Whether Sec.58 of the Charter of the French Language, as amended by Bill 178, Sec.1, violates any right that the authors might have by virtue of article 27;

(b) Whether Sec.58 of the Charter of the French Language, as amended by Bill 178, Sec.1, violates the authors' right to freedom of expression; and

(c) Whether the same provision is compatible with the authors' right to equality before the law.

11.2 As to article 27, the Committee observes that this provision refers to minorities in States; this refers, as do all references to the "State" or to "States" in the provisions of the Covenant, to ratifying States. Further, article 50 of the Covenant provides that its provisions extend to all parts of Federal States without any limitations or exceptions. Accordingly, the minorities referred to in article 27 are minorities within such a State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of article 27. English speaking citizens of Canada cannot be considered a linguistic minority. The authors therefore have no claim under article 27 of the Covenant.

11.3 Under article 19 of the Covenant, everyone shall have the right to freedom of expression; this right may be subjected to restrictions, conditions for which are set out in article 19, paragraph 3. The Government of Quebec has asserted that commercial activity such as outdoor advertising does not fall within the ambit of article 19. The Committee does not share this opinion. Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression. In the Committee's opinion, the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression from the scope of protected freedom. The Committee does not agree either that any of the above forms of

expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others.

11.4 Any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the restrictions on outdoor advertising are indeed provided for by law, the issue to be addressed is whether they are necessary for the respect of the rights of others. The rights of others could only be the rights of the francophone minority within Canada under article 27. This is the right to use their own language, which is not jeopardized by the freedom of others to advertise in other than the French language. Nor does the Committee have reason to believe that public order would be jeopardized by commercial advertising outdoors in a language other than French. The Committee notes that the State party does not seek to defend Bill 178 on these grounds. Any constraints under paragraphs 3 (a) and 3 (b) of article 19 would in any event have to be shown to be necessary. The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English. A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice. The Committee accordingly concludes that there has been a violation of article 19, paragraph 2.

11.5 The authors have claimed a violation of their right, under article 26, to equality before the law; the Government of Quebec has contended that Sections 1 and 6 of Bill 178 are general measures applicable to all those engaged in trade, regardless of their language. The Committee notes that Sections 1 and 6 of Bill 178 operate to prohibit the use of commercial advertising outdoors in other than the French language. This prohibition applies to French speakers as well as English speakers, so that a French speaking person wishing to advertise in English, in order to reach those of his or her clientele who are English speaking, may not do so. Accordingly, the Committee finds that the authors have not been discriminated against on the ground of their language, and concludes that there has been no violation of article 26 of the Covenant.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 19, paragraph 2, of the Covenant.

13. The Committee calls upon the State party to remedy the violation of article 19 of the Covenant by an appropriate amendment to the law.

14. The Committee would wish to receive information, within six months, on any relevant measures taken by the State party in connection with the Committee's views.

[Done in English, French and Spanish, the English and French texts being the original versions.]

Appendix

Individual opinions submitted pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's views on communications Nos. 359/1989 (Ballantyne and Davidson v. Canada) and 385/1989 (McIntyre v. Canada)

A. Individual opinion submitted by Mr. Waleed Sadi (dissenting)

I respectfully dissent from the Committee's decision and submit that it would have been appropriate to review the Committee's earlier decision on admissibility, on the basis of non-exhaustion of domestic remedies. My reasons are the following:

I am persuaded by the State party's contention that it would be open to the authors, under the Quebec Code of Civil Procedure, to apply for a declaratory judgement holding Bill 178 and the "notwithstanding" clause in Section 10 thereof to be invalid. Article 5, paragraph 2 (b), of the Optional Protocol requires the authors of communications to exhaust available domestic remedies; the Committee should not have proceeded with the examination of the merits of the cases in view of the availability of the domestic remedy in question.

In my opinion, the authors have not been able to refute the State party's contention that a declaratory judgement would not only be an available but also an effective remedy. The Canadian judicial system should have the opportunity to pronounce upon the constitutionality of Bill 178 and its controversial "notwithstanding" clause before the Committee proceeds with a finding on the merits of the communications. The Committee's decision to adopt views under article 5, paragraph 4, of the Optional Protocol, and to find a violation of article 19 of the Covenant has no precedent and is not, in my opinion, in accordance with the provisions of article 5, paragraph 2 (b), of the Protocol. I thus register my disagreement with the Committee's opinion that recourse to the Canadian courts, including the Supreme Court of Canada, would be futile and therefore not required for purposes of the Optional Protocol.

W. Sadi

[Done in English, French and Spanish, the English text being the original version.]

B. Individual opinion submitted by Mr. Birame Ndiaye (dissenting)

In accordance with article 27 of the Covenant, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. Through this provision, the Covenant categorically recognizes ("persons ... shall not be denied"), for every individual belonging to these three categories of minority, certain rights, namely, the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language.

These rights are recognized in respect of individuals for their own sake, but also and above all for the survival of the minority as an entity. Indeed, the existence of minorities such as those defined in article 27 cannot be imagined after the disappearance of the single element which constitutes them, namely, their ethnic character, religion or, lastly, language. The rationale of article 27 is the preservation of the three minorities referred to, and not the protection of the rights enunciated therein, merely for the sake of protection.

In the cases submitted to the Committee [Ballantyne/Davidson (359/1989) and McIntyre (385/1989)], Quebec considered that "historical developments since 1763 amply bear out the need for French-speakers to seek protection of their language and culture". Thus, the goal pursued by the Charter of the French Language, as amended by Bill 178, is the very same as that aimed at by article 27 of the Covenant, to which effect must be given, if necessary by restricting freedom of expression on the basis of article 19, paragraph 3. Under this provision "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals".

The limitations embodied in article 19, paragraph 3 (a) and (b), are applicable to the situation of the French-speaking minority in Canada. And as this country has maintained, albeit with too narrow a conception of freedom of expression, "the Charter of the French Language, as amended ..., may provide Quebec with a means of preserving its specific linguistic character and give French-speakers a feeling of linguistic security". This is reasonable and is geared to ends compatible with the Covenant, namely, article 27.

Unfortunately, the Human Rights Committee has not endorsed the State party's view and has not agreed to integrate the requirements of implementation of article 27 in its decision. For the Committee, there is no linguistic problem in Canada or, if it does exist, it is not so important as to merit the treatment which the authorities of that country have chosen to extend to it. I can only disassociate myself from its conclusions.

B. Ndiaye

[Done in English, French and Spanish, the French text being the original version.]

C. Individual opinion submitted by Mr. Kurt Herndl (dissenting/concurring)

I agree with the Committee's views that the facts of the McIntyre case disclose a violation of article 19 of the Covenant. As to the communication of Mr. Ballantyne and Ms. Davidson, I believe that a question remains whether they are indeed "victims" within the meaning of article 1 of the Optional Protocol.

With respect to the Committee's rationale in paragraph 11.2 of its views, the communications in my opinion do not raise issues under article 27 of the Covenant. The question as to whether the authors can or cannot be considered as belonging to a "minority" in the sense of article 27 would seem to be moot in as much as the rights that the authors invoke are not "minority rights" as such, but rather rights pertaining to the principle of freedom of expression, as protected by article 19 of the Covenant, which obviously must be taken to include commercial advertising. On this account, as the Committee rightly states in paragraphs 11.3 and 11.4 of its views, there has been violation of a provision of the Covenant, i.e. article 19.

K. Herndl

[Done in English, French and Spanish, the English text being the original version.]

D. Individual opinion submitted by Mr. Bertil Wennergren (concurring)

I concur with the Committee's findings in paragraph 11.2 of the views that the authors have no claim under article 27 of the Covenant, but I do so because a prohibition to use any other language than French for commercial outdoor advertising in Quebec does not infringe on any of the rights protected under article 27. It is, under the circumstances, of no relevance, whether English speaking persons in Quebec are entitled to the protection of article 27 or not. I feel, however, that I should add that in my opinion, the issue of what constitutes a minority in a State must be decided on a case-by-case basis, due regard being given to the particular circumstances of each case.

B. Wennergren

[Done in English, French and Spanish, the English text being the original version.]

E. Individual opinion submitted by Mrs. Elisabeth Evatt, cosigned by Mr. Nisuke Ando, Mr. Marco Tulio Bruni Celli and Mr. Vojin Dimitrijevic (concurring and elaborating)

It may be correct to conclude that the authors are not members of a linguistic minority whose right to use their own language in community with the other members of their group have been violated by the Quebec laws in question. This conclusion can be supported by reference to the general application of those laws - they apply to all languages other than French - and to their specific purpose - which attracts the protection of article 19.

My difficulty with the decision is that it interprets the term "minorities" in article 27 solely on the basis of the number of members of the group in question in the State party. The reasoning is that because English speaking Canadians are not a numerical minority in Canada they cannot be a minority for the purposes of article 27.

I do not agree, however, that persons are necessarily excluded from the protection of article 27 where their group is an ethnic, linguistic or cultural minority in an autonomous province of a State, but is not clearly a numerical minority in the State itself, taken as a whole entity. The criteria for determining what is a minority in a State (in the sense of article 27) have not yet been considered by the Committee, and do not need to be foreclosed by a decision in the present matter, which can in any event be determined on other grounds. The history of the protection of minorities in international law shows that the question of definition has been difficult and controversial and that many different criteria have been proposed. For example, it has been argued that factors other than strictly numerical ones need to be taken into account. Alternatively, article 50, which envisages the application of the Covenant to "parts of federal States" could affect the interpretation of article 27.

To take a narrow view of the meaning of minorities in article 27 could have the result that a State party would have no obligation under the Covenant to ensure that a minority in an autonomous province had the protection of article 27 where it was not clear that the group in question was a minority in the State considered as a whole entity. These questions do not need to be finally resolved in the present matter and are better deferred until the proper context arises.

E. Evatt
N. Ando
M. T. Bruni Celli
V. Dimitrijevic

[Done in English, French and Spanish, the English text being the original version.]

Q. Communication No. 362/1989, Balkissoon Soogrim v. Trinidad and Tobago (views adopted on 8 April 1993, forty-seventh session)

Submitted by: Balkissoon Soogrim (represented by counsel)

Alleged victim: The author

State party: Trinidad and Tobago

Date of communication: 19 March 1989

Date of decision on admissibility: 9 July 1991

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 April 1993,

Having concluded its consideration of communication No. 362/1989, submitted to the Human Rights Committee by Mr. Balkissoon Soogrim under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication (dated 19 March 1989) is Balkissoon Soogrim, a Trinidadian citizen currently awaiting execution at the State Prison in Port-of-Spain, Trinidad and Tobago. He claims to be the victim of a violation by Trinidad and Tobago of articles 7 and 9, paragraphs 2, 10 and 14, paragraphs 1 and 3 (g), of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 The author was arrested on 7 September 1978 on suspicion of having murdered, during the night between 6 and 7 September 1978, one Henderson Hendy in a cane field in the County of Caroni. On 11 September 1978, the Chaguanas Magistrate's Court committed him and his co-defendant, Ramesh Marahaj, to stand trial before the High Court of Justice in Port-of-Spain. a/ On 6 November 1980, they were convicted of murder. On 5 July 1983, the Court of Appeal quashed the convictions and ordered a retrial. At the end of the retrial, on 29 June 1984, the High Court of Justice of Port-of-Spain again convicted the author and his co-defendant of murder and sentenced them to death. Their appeal was dismissed by the Court of Appeal on 9 July 1985. A subsequent petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 22 May 1986.

2.2 The author submits that in 1986 a constitutional motion to the High Court of Trinidad and Tobago was filed on his behalf. However, the matter was adjourned, pending the outcome of two other cases before the Court. He claims that, regardless of whether this constitutional motion is still pending, the application of domestic remedies in his case has been unreasonably prolonged.

The constitutional motion was last scheduled to be heard on 7 January 1991 but was adjourned, apparently sine die.

2.3 The conviction of the author and his co-defendant was based substantially, if not exclusively, on the evidence produced by the main prosecution witness, L. S. Her testimony was to the effect that, on the morning of 6 September 1978, she went to the Couva Magistrate's Court to attend the hearing of a case in which the author was involved. As the hearing of the case was adjourned, she and the author left the court together with a third individual and visited some places of entertainment where they had drinks. Later that day, they separated from the third person and drove to the house of Ramesh Marahaj, who joined them. In the evening, they drove to a snack bar in San Juan, where the author and his co-defendant bought some drinks; this was apparently corroborated by the cashier of the snack bar. After leaving, the three of them drove to the deceased's house. She further testified that the author and his co-defendant invited Henderson Hendy to join them in having some fun with the woman. She claimed that, although she was aware of the men's intentions, she was too scared to react. They then drove to a sugarcane field and there they tried to abuse her. She maintained that the author hit the deceased in the neck while he was over her; while the author's co-defendant was holding Mr. Hendy to prevent him from escaping, she heard the author firing three shots. No bullets or shells were, however, found when the police searched the field in which, according to her, Henderson Hendy was killed. She added that they subsequently drove to a beach; there, the author allegedly threw the murder weapon, a cutlass, into the sea and hid a pair of trousers which belonged to the deceased in nearby bushes. A subsequent search of the beach by the police produced the trousers but not the cutlass. The woman added that the author and his co-defendant threatened her with death if she were to report to the police. During cross-examination, she admitted that she decided to report to the police only after her father had told her that the police were looking for her. She voluntarily presented herself to the police station, where she was cautioned and held in custody for a few days.

2.4 The author denies any involvement in the crime. At the trial he stated that, on the morning of 6 September 1978, he went to the Couva Magistrate's Court with his wife, his mother and his brother, and that, after leaving the court at 10 a.m., he went to see his doctor. The latter treated him and gave him a medical certificate, which he tendered as evidence. He further asserts that after he left the doctor's cabinet, he returned home for the remainder of the day.

Complaint

3.1 The author claims that the principal prosecution witness, L. S., was an accomplice or abettor, and that the trial judge failed to properly instruct the jury on the corroboration of her evidence. Moreover, the author maintains that the Court of Appeal erred in holding that there was no need for the trial judge to give a warning as to the corroboration. In this connection, it is submitted that the issue of appropriate instructions was all the more important because of the alleged inconsistencies in the prosecution witnesses' testimony during the second trial.

3.2 As to his treatment during detention, the author claims that following his arrest on 7 September 1978, he was taken to a police station, where he was subjected to beatings and physical abuse and forced to sign a statement placing him on the scene of the murder. On 11 September, he complained about this treatment before the Magistrate's Court and a medical examination was ordered.

The examination apparently was inconclusive, showing minor injuries that also could have been inflicted by the author himself. The issue was also raised before the court of first instance and on appeal. Some passages of the summing-up by the judge presiding over the retrial describe the nature of the psychological pressure and degrading treatment to which the author was allegedly subjected to in custody.

3.3 The author further claims that he was not informed of the charges against him until three days after his arrest. He does not, however, clarify this point.

3.4 The author further complains of inhuman and degrading treatment allegedly suffered since February 1987 in the State Prison of Port-of-Spain. On 2 February 1987 and again on 21 September 1988, he was allegedly beaten by prison warders and, on another occasion, left naked in a cold cell for two weeks. His complaints to the prison authorities were not followed up. He identifies the warders and prison officials whom he holds responsible for his continuously deteriorating state of health. In this context, he indicates that the virtually complete lack of exercise and sunlight in the prison has caused arthritis in his joints: furthermore, his eyesight has deteriorated during more than 10 years on death row, so that the prison doctor referred him to an eye clinic. The Commissioner of Prisons, however, informed him that there was no money for such medical treatment and that in any case he was in prison to die. The author further claims that visits from his family have been frequently delayed or restricted to very short periods. All this, it is submitted, constitutes a clear infringement of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

State party's observations

4. As to the admissibility of the communication, the State party refers to the author's statement that a constitutional motion has been filed on his behalf and indicates that "the Ministry of Justice and National Security is awaiting confirmation from the Registrar of the Supreme Court with respect to the filing of such a motion".

Committee's decision on admissibility

5.1 During its forty-second session the Committee considered the admissibility of the communication. It considered that the author's claim relating to the court's evaluation of the evidence and the judge's instructions to the jury pertained to facts and evidence which are in principle for appellate courts of States parties to the Covenant to evaluate; this part of the communication was therefore declared inadmissible. The Committee further considered that the author's claim under article 9 of the Covenant had not been substantiated for purposes of admissibility.

5.2 As to the author's claims under articles 7, 10, and 14, paragraph 3 (g), of the Covenant, the Committee considered that the author had exhausted domestic remedies available to him. On 9 July 1991, the Committee, accordingly, declared the communication admissible in as much as it might raise issues under articles 7, 10 and 14, paragraph 3 (g), of the Covenant.

Review of admissibility

6. In its submission dated 11 February 1992, the State party argues that the author's claim that he was forced to sign an incriminating statement should be deemed inadmissible, since it pertains to facts and evidence, which are generally for the appellate courts of States parties to evaluate, and not for the Committee. It further submits that, on 27 September 1991, the author was granted legal aid in order to bring a constitutional motion against his death sentence; this motion has yet to be heard.

7. In his comments on the State party's submission, dated 5 March 1992, the author argues that the constitutional remedy has been unreasonably prolonged within the meaning of article 5, paragraph 2, of the Optional Protocol.

8. The Committee observes that article 5, paragraph 2 (b), of the Optional Protocol precludes the Committee from considering a communication if the author has failed to exhaust domestic remedies. The Committee notes that, in respect to his claim under article 14 of the Covenant, the author has obtained the services of a legal aid lawyer and is pursuing constitutional remedies. The Committee further observes that decisions of the High Court in two other cases have resulted in the release of the applicants. In the particular circumstances of the instant case, the Committee considers that the constitutional motion filed by the author cannot be deemed to be prima facie ineffective and that it is a remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

9. The Committee, therefore, reverses its decision on admissibility and decides that this part of the communication, concerning article 14 of the Covenant, is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

Examination of the merits

10. In the light of the above, the Committee decides to proceed with its examination of the merits of the communication in so far as it relates to allegations under articles 7 and 10 of the Covenant.

11.1 In its submissions, dated 11 February and 27 July 1992, the State party argues that the author's allegations are unsubstantiated. It encloses a report by the Commissioner of Prisons of Trinidad and Tobago, whom the State party had requested to investigate the allegations.

11.2 According to the report, dated 20 November 1991, the author was charged with disciplinary offences on 2 February 1987 and 21 September 1988. The report states that reasonable force had to be applied by prison officers to control the author. In a supplementary report it is submitted that the author was reprimanded on two of the five charges against him; three charges were dismissed. In the report, it is denied that the author was left naked in a cell for two weeks. It is submitted that the author's complaints have in the past been brought to the attention of the Inspector of Prisons, the Ministry of Justice and National Security and the Ombudsman.

11.3 With regard to prison conditions, it is stated that Prison Regulations afford condemned prisoners one hour of open air exercise per day. According to the report, the prison medical records, although revealing complaints about minor pains about the author's joints, confirm no history of chronic arthritis.

In a memorandum, dated 2 June 1992, the Prison Medical Officer states that the author has a six-year history of hypertension, but that his physical and psychiatric state of health is normal, except for high blood pressure.

11.4 As regards the author's complaints about the deteriorating sight in his one eye, it is stated that the author has been treated at the Eye Clinic of the Port-of-Spain General Hospital; a pair of spectacles was issued to him, which he has been using for the past two years. Follow-up treatment has recently been recommended by the Medical Officer and an appointment has been made for 15 October 1992.

12.1 In his comments on the State party's submission, the author argues that the Commissioner's report does not reflect the truth, but tries to cover up the human rights abuses going on in the prison.

12.2 The author argues that, even though the Prison Regulations allow one hour of open air exercise per day, in practice he is only allowed at most one hour per week, due to a shortage of prison staff. He maintains that he is suffering from arthritis, and contends that the doctor has diagnosed it as such and has prescribed the use of the medicine Indosid. The author concedes that spectacles were issued to him several years ago, but claims that his family had to pay for them; he further claims that the spectacles are no longer of use, because of the deterioration of his eyesight.

12.3 With regard to the disciplinary charges, the author argues that they have been fabricated to cover up the unlawful use of force against him. He submits that all charges against him were dismissed. The author concedes that the Minister of Justice and National Security had ordered investigations of his complaints, but he claims that the prison authorities compiled a false report, so that no action was taken. He maintains that he was left naked in a cell for two weeks, and he states that several witnesses would be able to confirm his allegations.

13.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

13.2 As to the substance of the communication, two issues are before the Committee: (a) whether the author was a victim of inhuman or degrading treatment, because on two occasions, he was allegedly beaten by prison warders and on one occasion left naked in a cell for two weeks; and (b) whether the conditions of his detention constitute a violation of article 10 of the Covenant.

13.3 In order to decide on these issues, the Committee must consider the arguments put forward by the author and the State party and assess their respective merits and intrinsic credibility. Concerning the beatings he allegedly received, Mr. Soogrim has given precise details, identified those he holds responsible and affirmed that he lodged complaints after being ill-treated. In this regard, the State party has not really issued any denial. It has admitted only that force was used against Mr. Soogrim although within reasonable limits and in order to control him, this having occurred on the dates referred to by the author of the communication. The State party furthermore recognizes that the author did report the facts he alleges and that his complaints were brought to the attention of the Inspector of Prisons, the Ministry of Justice and National Security and the Ombudsman. In addition, the

explanations given by the author and the State party regarding the disciplinary charges reportedly filed against him are contradictory, but nevertheless concur in that some of them were dismissed by the State party. The dismissal of these charges, however, casts doubt on the facts as presented in the report dated 20 November 1991. Lastly, concerning the allegation that the author was left naked in his cell for two weeks, the Committee has no more specific information available to it than the claims of the author and the denials of the State party.

13.4 With regard to the author's allegations that he has not received the necessary medical care for his state of health and has been deprived of open-air exercise, the information communicated by the State party shows, with reference to his medical record, that he has been given medical treatment and, in particular, that his eyesight has been corrected and is checked regularly at the Port-of-Spain General Hospital. As to the hour of open-air exercise per day allowed by the prison regulations, there is no basis, apart from Mr. Soogrim's allegations, on which to affirm that he is being regularly deprived of such exercise.

14. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7 and, consequently, article 10, paragraph 1, of the International Covenant on Civil and Political Rights in so far as the author was beaten by prison warders on several occasions.

15. The Committee is of the view that Mr. Balkissoon Soogrim is entitled to a remedy, including appropriate compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

16. The Committee wishes to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee's views.

[Done in English, French and Spanish, the English and French texts being the original versions.]

Notes

a/ Mr. Marahaj's case is also under consideration by the Human Rights Committee as communication No. 384/1989.

R. Communication No. 387/1989, Arvo O. Karttunen v. Finland
(views adopted on 23 October 1992, forty-sixth session)

Submitted by: Arvo O. Karttunen (represented by counsel)

Alleged victim: The author

State party: Finland

Date of communication: 2 November 1989

Date of decision on admissibility: 14 October 1991

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 October 1992,

Having concluded its consideration of communication No. 387/1989, submitted to the Human Rights Committee by Arvo O. Karttunen under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.*

1. The author of the communication is Arvo O. Karttunen, a Finnish citizen residing in Helsinki, Finland. He claims to be a victim of violations by Finland of article 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 The author was a client of the Rääkkyla Cooperative Bank, which financed his business activities through regular disbursement of loans. In July 1983, he declared bankruptcy, and on 23 July 1986 he was convicted on a charge of fraudulent bankruptcy by the Rääkkyla District Court and sentenced to 13 months of imprisonment. The Itä-Suomi Court of Appeal (Court of Appeal for Eastern Finland) confirmed the judgment of first instance on 31 March 1988. On 10 October 1988, the Supreme Court denied leave to appeal.

2.2 Finnish district courts are composed of one professional judge and five to seven lay judges, who serve in the same judicial capacity as the career judge. The latter normally prepares the court's decision and presents it to the full court, which subsequently considers the case. The court's decisions are usually adopted by consensus. In the event of a split decision, the career judge casts the decisive vote.

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* An individual opinion submitted by Mr. Bertil Wennergren is appended.

2.3 In Mr. Karttunen's case, the court consisted of one career judge and five lay judges. One lay judge, V. S., was the uncle of E. M., who himself was a partner of the Säkhöjohto Ltd. Partnership Company, which appeared as a complainant against the author. While interrogating the author's wife, who testified as a witness, V. S. allegedly interrupted her by saying "She is lying". The remark does not, however, appear in the trial transcript or other court documents. Another lay judge, T. R., allegedly was indirectly involved in the case prior to the trial, since her brother was a member of the board of the Rääkkyla Cooperative Bank at the time when the author was a client of the Bank; the brother resigned from the board with effect of 1 January 1984. In July 1986, the Bank also appeared as a complainant against the author.

2.4 The author did not challenge the two lay judges in the proceedings before the District Court; he did raise the issue before the Court of Appeal. He also requested that the proceedings at the appellate stage be public. The Court of Appeal, however, after having re-evaluated the evidence in toto, held that whereas V. S. should have been barred from acting as a lay judge in the author's case pursuant to Section 13, paragraph 1, of the Code of Judicial Procedure, the judgement of the District Court had not been adversely affected by this defect. It moreover found that T. R. was not barred from participating in the proceedings, since her brother's resignation from the board of the Rääkkyla Cooperative Bank had been effective on 1 January 1984, long before the start of the trial. The Court of Appeal's judgement of 31 March 1988 therefore upheld the lower court's decision and dismissed the author's request for a public hearing.

Complaint

3.1 The author contends that he was denied a fair hearing both by the Rääkkyla District Court and the Court of Appeal, in violation of article 14, paragraph 1, of the Covenant.

3.2 The author claims that the proceedings before the Rääkkyla District Court were not impartial, since the two lay judges, V. S. and T. R., should have been disqualified from the consideration of his case. In particular, he claims that the remark of V. S. during the testimony of Mrs. Karttunen, amounts to a violation of article 14, paragraph 1, of the Covenant. In this context, he argues that while Section 13, paragraph 1, of the Code of Judicial Procedure provides that a judge cannot sit in court if he was previously involved in the case, it does not distinguish between career and lay judges. If the court is composed of only five lay judges, as in his case, two lay judges can considerably influence the court's verdict, as every lay judge has one vote. The author further contends that the Court of Appeal erred in finding that (a) one of the lay judges, T. R., was not disqualified to consider the case, and (b) the failure of the District Court to disqualify the other lay judge because of conflict of interest had no effect on the outcome of the proceedings.

3.3 Finally, the author asserts that article 14, paragraph 1, was violated because the Court of Appeal refused to examine the appeal in a public hearing, despite his formal requests. This allegedly prevented him from submitting evidence to the court and from having witnesses heard on his behalf.

State party's information and observations

4.1 The State party concedes that the author has exhausted available domestic remedies but argues that the communication is inadmissible on the basis of

article 3 of the Optional Protocol. In respect of the contention that the proceedings in the case were unfair because of the alleged partiality of two lay judges, it recalls the Court of Appeal's findings (see para. 3.2) and concludes that since the career judge in practice determines the court's judgement, the outcome of the proceedings before the RÄÄkkyla District Court was not affected by the participation of a judge who could have been disqualified.

4.2 Concerning the author's contention that the Court of Appeal denied him his right to a public hearing, the State party contends that the right to an oral hearing is not encompassed by article 14, paragraph 1, and that this part of the communication should be declared inadmissible ratione materiae, pursuant to article 3 of the Optional Protocol.

Committee's decision on admissibility

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 During its forty-third session, the Committee considered the admissibility of the communication. While noting the State party's contention that the communication was inadmissible under article 3 of the Optional Protocol, it observed that the material placed before it by the author in respect of alleged irregularities in the judicial proceedings raised issues that should be examined on the merits, and that the author had made reasonable efforts to substantiate his claims, for purposes of admissibility.

5.3 On 14 October 1991, the Committee declared the communication admissible in respect of article 14 of the Covenant. It requested the State party to clarify, in particular: (a) how Finnish law guarantees the impartiality of tribunals and how these guarantees were applied in the instant case, and (b) how domestic law safeguards the public nature of proceedings, and whether the procedure before the Court of Appeal could be considered to have been public.

State party's observations on the merits

6.1 In its submission on the merits, the State party observes that the impartiality of Finnish courts is guaranteed in particular through the regulations governing the disqualification of judges (Chapter 13, Section 1, of the Code of Judicial Procedure). These provisions enumerate the reasons leading to the disqualification of a judge, which apply to all court instances; furthermore, Section 9 of the District Court Lay Boards Act (No. 322/69) provides that the disqualification of district court lay judges is governed by the regulations on disqualification of judges. These rules suffer no exception: no one who meets any of the disqualification criteria may sit as judge in a case. The Court must, moreover, ex officio take the disqualification grounds into consideration.

6.2 The State party concedes that the proceedings before the RÄÄkkyla District Court did not meet the requirement of judicial impartiality, as was acknowledged by the Court of Appeal. It was incumbent upon the Court of Appeal to correct this procedural error; the court considered that the failure to exclude lay judge V. S. did not influence the verdict, and that it was able to reconsider the matter in toto, on the basis of the trial transcript and the recording thereof.

6.3 The State party concedes that the Court of Appeal's opinion might be challenged, in that the alleged improper remarks of V. S. could very well have influenced the procurement of evidence and the content of the court's decision. Similarly, since the request for a public appeal hearing was rejected by the Court of Appeal, it could be argued that no public hearing in the case took place, since the procedure before the District Court was flawed, and the Court of Appeal did not return the matter for reconsideration by a properly qualified District Court.

6.4 Concerning the issue of publicity of the proceedings, the State party affirms that while this rule is of great practical significance in proceedings before the lower courts (where they are almost always oral), the hearing of an appeal before the Court of Appeal is generally a written procedure. Proceedings as such are not public but the documents gathered in the process are accessible to the public. Wherever necessary, the Court of Appeal may hold oral proceedings, which may be confined to only part of the issues addressed in the appeal. In the author's case, the Court of Appeal did not consider it necessary to hold a separate oral hearing on the matter.

6.5 The State party notes that neither the Committee's General Comment on article 14 nor its jurisprudence under the Optional Protocol provides direct guidance for the resolution of the case; it suggests that the interpretation of article 6 of the European Convention of Human Rights and Fundamental Freedoms may be used to assist in the interpretation of article 14 of the Covenant. In this context, the State party observes that the evaluation of the fairness of a trial in the light of article 14 of the Covenant must be made on the basis of an overall evaluation of the individual case, as the shortcomings in the proceedings before a lower court may be corrected through a hearing in the Court of Appeal. It is paramount that the principle of equality of arms be observed at all stages, which implies that the accused must have an opportunity to present his case under conditions which do not place him at a disadvantage in relation to other parties to the case.

6.6 The State party contends that while the Committee has repeatedly held that it is not in principle competent to evaluate the facts and evidence in a particular case, it should be its duty to clarify that the judicial proceedings as a whole were fair, including the way in which evidence was obtained. The State party concedes that the issue of whether a judge's possible personal motives influenced the decision of the court is not normally debated; thus, such motives cannot normally be found in the reasoned judgement of the court.

6.7 The State party observes that if the obvious disqualification of lay judge V. S. is taken into account, "neither the subjective, nor the objective test of the impartiality of the court may very well said to have been passed. It may indeed be inquired whether a trial held in th[ese] circumstances together with its documentary evidence may be regarded to such an extent reliable that it has been possible for the court of appeal to decide the matter solely ... by a written procedure".

6.8 On the other hand, the State party argues, the author had indeed the opportunity to challenge the disqualification of V. S. in the District Court, and to put forth his case in both the appeal to the Court of Appeal and the Supreme Court. Since both the prosecutor and the author appealed against the verdict of the District Court, it could be argued that the Court of Appeal was in a position to review the matter in toto, and that accordingly the author was

not placed in a position that would have significantly obstructed his defence or influenced the verdict in a way contrary to article 14.

6.9 The State party reiterates that the publicity of judicial proceedings is an important aspect of article 14, not only for the protection of the accused but also to maintain public confidence in the functioning of the administration of justice. Had the Court of Appeal held a public oral hearing in the case, or quashed the verdict of the District Court, then the flaw in the composition of the latter could have been deemed corrected. As this did not occur in the author's case, his demand for an oral hearing may be considered justified in the light of article 14 of the Covenant.

Examination of the merits

7.1 The Committee is called upon to determine whether the disqualification of lay judge V. S. and his alleged disruption of the testimony of the author's wife influenced the evaluation of evidence by, and the verdict of, the Rääkkyla District Court, in a way contrary to article 14, and whether the author was denied a fair trial on account of the Court of Appeal's refusal to grant the author's request for an oral hearing. As the two questions are closely related, the Committee will address them jointly. The Committee expresses its appreciation for the State party's frank cooperation in the consideration of the author's case.

7.2 The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1. "Impartiality" of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider ex officio these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14.

7.3 It is possible for appellate instances to correct the irregularities of proceedings before lower court instances. In the present case, the Court of Appeal considered, on the basis of the written evidence, that the District Court's verdict had not been influenced by the presence of lay judge V. S., while admitting that V. S. manifestly should have been disqualified. The Committee considers that the author was entitled to oral proceedings before the Court of Appeal. As the State party itself concedes, only this procedure would have enabled the Court to proceed with the re-evaluation of all the evidence submitted by the parties, and to determine whether the procedural flaw had indeed affected the verdict of the District Court. In the light of the above, the Committee concludes that there has been a violation of article 14, paragraph 1.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of article 14, paragraph 1, of the Covenant.

9. In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to provide the author with an effective remedy for the violation suffered.

10. The Committee would wish to receive from the State party, within 90 days, information about any measures adopted by the State party in respect of the Committee's views.

Appendix

Individual opinion submitted by Mr. Bertil Wennergren, pursuant to rule 94, paragraph 3, of the Committee's rules of procedure concerning the Committee's views on communication No. 387/1989 (Arvo O. Karttunen v. Finland)

Mine is not a dissenting opinion; I merely want to clarify my view on the Committee's reasoning in this case. Mr. Karttunen's case concerns procedural requirements before an appellate court in criminal proceedings. The relevant provisions of the Covenant are laid out in article 14, firstly the general requirements for fair proceedings in paragraph 1, secondly the special guarantees in paragraph 3. Paragraph 1 applies to all stages of the judicial proceedings, be they before the court of first instance, the court of appeal, the Supreme Court, a general court of law or a special court. Paragraph 3 applies only to criminal proceedings and primarily to proceedings at first instance. The Committee's jurisprudence, however, has found the requirements of paragraph 3 to be also applicable to review and appellate procedures in criminal cases, i.e. the rights to have adequate time and facilities for the preparation of the defence and to communicate with counsel of one's own choosing (art. 14, para. 3 (b)), to be tried without undue delay (art. 14, para. 3 (c)), to have legal assistance assigned in any case where the interests of justice so require and without payment by the accused if he does not have sufficient means to pay for it (art. 14, para. 3 (d)), to have free assistance of an interpreter if the accused cannot understand or speak the language used in court (art. 14, para. 3 (f)), and finally the right not to be compelled to testify against himself or to confess guilt (art. 14, para. 3 (g)). That all these provisions should, mutatis mutandis, also apply to review procedures is only normal, as they are emanations of a fair trial, which in general terms is required under article 14, paragraph 1.

Under article 14, paragraph 1, everyone is entitled not only to a fair but also to a public hearing; moreover, according to article 14, paragraph 3 (d), the accused is entitled to be tried in his presence. According to the travaux préparatoires to the Covenant, the concept of a "public hearing" must be read against the background that in the legal system of many countries, trials take place on the basis of written documentation, which is deemed not to place at risk the parties' procedural guarantees, as the content of all these documents can be made public. In my opinion, the requirement, in paragraph 1 of article 14, for a "public hearing" must be applied in a flexible way and cannot prima facie be understood as requiring a public oral hearing. I further consider that this explains why, at a later stage of the travaux préparatoires on article 14, paragraph 3 (d), the right to be tried in one's own presence before the court of first instance was inserted.

In accordance with the Committee's case law, there can be no a priori assumption in favour of public oral hearings in review procedures. It should be noted that the right to be tried in one's own presence has not explicitly been spelled out in the corresponding provision of the European Convention on Human Rights (art. 6, para. 3 (c)). This in my opinion explains why the European Court of Human Rights, unlike the Committee, has found itself bound to interpret the concept of "public hearing" as a general requirement of "oral". The formulations of article 14, paragraphs 1 and 3 (d), of the Covenant leave room for a case-by-case determination of when an oral hearing must be deemed necessary in review procedures, from the point of view of the concept of "fair

trial". With regard to Mr. Karttunen's case, an oral hearing was in my view undoubtedly required from the point of view of "fair trial" (within the meaning of article 14, paragraph 3 (d)), as Mr. Karttunen had explicitly asked for an oral hearing that could not a priori be considered meaningless.

Bertil Wennergren
November 1992

[Done in English, French, Russian and Spanish, the English text being the original version.]

S. Communication No. 402/1990, Henricus Antonius Godefriedus Maria Brinkhof v. the Netherlands (views adopted on 27 July 1993, forty-eighth session)

Submitted by: Henricus Antonius Godefriedus Maria Brinkhof (represented by counsel)

Alleged victim: The author

State party: The Netherlands

Date of communication: 11 April 1990 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 1993,

Having concluded its consideration of communication No. 402/1990, submitted to the Human Rights Committee by Mr. H. A. G. M. Brinkhof under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Henricus A. G. M. Brinkhof, a citizen of the Netherlands, born on 1 January 1962, residing at Erichem, the Netherlands. He is a conscientious objector to both military service and substitute civilian service and claims to be the victim of a violation by the Government of the Netherlands of articles 6, 7, 8, 14, 18 and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 The author did not report for his military service on a specified day. He was arrested and brought to the military barracks, where he refused to obey orders to accept a military uniform and equipment on the ground that he objected to military service and substitute public service as a consequence of his pacifist convictions. On 21 May 1987, he was found guilty of violating articles 23 and 114 of the Military Penal Code (Wetboek van Militair Strafrecht) and article 27 of the Penal Code (Wetboek van Strafrecht) by the Arnhem Military Court (Arrondissementskrijgsraad) and sentenced to six months' imprisonment and dismissal from military service.

2.2 Both the author and the Public Prosecutor appealed to the Supreme Military Court (Hoog Militair Gerechtshof) which, on 26 August 1987, found the author guilty of violating articles 23 and 114 of the Military Penal Code and sentenced him to 12 months' imprisonment and dismissal from military service. On 17 May 1988, the Supreme Court (Hoge Raad) rejected the author's appeal.

Complaint

3.1 The author contends that whereas article 114 of the Military Penal Code, on which his conviction was based, applies to disobedient soldiers, it does not

apply to conscientious objectors, as they cannot be considered to be soldiers. He claims, therefore, that his refusal to obey military orders was not punishable by law.

3.2 The Supreme Military Court rejected the author's argument and, noting that article 114 of the Military Penal Code did not differentiate between conscientious objections and other objections to military service, considered article 114 applicable.

3.3 The author also alleges a violation of article 26 of the Covenant, on the grounds that while conscientious objectors may be prosecuted under the Military Penal Code, Jehovah's Witnesses may not.

3.4 The Supreme Military Court dismissed this argument, stating that Jehovah's Witnesses, unlike conscientious objectors, are not required to do military service, and thus cannot commit offences under the Military Penal Code. The Supreme Military Court further considered that it was not competent to examine the draft policy of the Netherlands Government.

3.5 The author further alleges that the proceedings before the courts suffered from various procedural defects, notably that the courts did not correctly apply international law.

3.6 The author's defence was based on the argument that by performing military service, he would become an accessory to the commission of crimes against peace and the crime of genocide, as he would be forced to participate in the preparation for the use of nuclear weapons. In this context, the author regards the strategies of the North Atlantic Treaty Organization (NATO) as well as the military-operational plans based on them, which envisage resort to nuclear weapons in armed conflict, as a conspiracy to commit a crime against peace and/or the crime of genocide.

3.7 According to the author, if the NATO strategy is meant to be a credible deterrent, it must imply that political and military leaders are prepared to use nuclear weapons in armed conflict. The author states that the use of nuclear weapons is unlawful.

3.8 The Supreme Military Court rejected the author's line of defence. It held that the question of the author's participation in a conspiracy to commit genocide or a crime against peace did not arise, as the international rules and principles invoked by the author do, in the view of the Court, not concern the issue of the deployment of nuclear weapons and likewise the conspiracy does not occur, since the NATO doctrine does not automatically imply use without further consultations.

3.9 The author further alleges that the Supreme Military Court was not impartial within the meaning of article 14, paragraph 1, of the Covenant. He explains that the majority of the members of the Supreme Military Court were high-ranking members of the armed forces who, given their professional background, could not be expected to hand down an impartial verdict. Furthermore, the civilian members of the Supreme Military Court had served in the highest ranks of the armed forces during their professional careers.

3.10 The author also invoked the defence of force majeure, because, as a conscientious objector to any form of violence, he could not act in any other

way than he did. By prosecuting him, the State party has violated his right to freedom of conscience.

3.11 The Supreme Military Court rejected this defence by referring to the Act on Conscientious Objection to Military Service, under which the author could have applied for substitute civilian service. According to the author, however, his conscience prevents him from filing a request under the Act on Conscientious Objection to Military Service.

3.12 Finally, the author alleges another violation of article 26 of the Covenant, on the ground that the Military Penal Code, unlike the Penal Code, makes no provisions for an appeal against the summons. According to the author, it is inconceivable that civilians who become soldiers should be discriminated vis-à-vis other civilians.

State party's observations and author's clarifications

4.1 The State party notes that a State's right to require its citizens to perform military service, or substitute service in the case of conscientious objectors whose grounds for objection are recognized by the State, is, as such, not contested. Reference is made to article 8, paragraph 3 (c) (ii), of the Covenant.

4.2 The State party states that Jehovah's Witnesses have been exempted from military service since 1974. Amendments to the Conscription Act, which are being prepared in order to make provision for the hearing of "total objectors", continue to provide for the exemption of Jehovah's Witnesses. In the view of the Government, membership of Jehovah's Witnesses constitutes strong evidence that the objections to military service are based on genuine religious convictions. Therefore, they automatically qualify for exemption. However, this does not exclude the possibility for other individuals to invoke the Act on Conscientious Objection to Military Service.

4.3 The Government takes the view that the independence and impartiality of the Supreme Military Court in the Netherlands is guaranteed by the following procedures and provisions:

(a) The president and the member jurist of the Supreme Military Court are judges in the Court of Appeal (Gerechtshof) in The Hague, and remain president and member jurist as long as they are members of the Court of Appeal;

(b) The military members of the Supreme Military Court are appointed by the Crown. They are discharged after reaching 70 years of age;

(c) The military members of the Supreme Military Court do not hold any function in the military hierarchy. Their salaries are paid by the Ministry of Justice;

(d) The president and the members of the Supreme Military Court have to take an oath before they take up their appointment. They swear or vow to act in a fair and impartial way;

(e) The president and the members of the Supreme Military Court do not owe any obedience nor are they accountable to any one regarding their decisions;

(f) As a rule the sessions of the Supreme Military Court are public.

4.4 The State party points out that national and international judgements have confirmed the impartiality and independence of the military courts in the Netherlands. Reference is made to the Engel Case of the European Court of Human Rights a/ and to the judgement of the Supreme Court of the Netherlands of 17 May 1988.

4.5 With regard to the exhaustion of domestic remedies, the State party claims that the Act on Conscientious Objection to Military Service (Wet Gewetensbezwaren Militaire Dienst) is an effective remedy to insuperable objections to military service. The State party contends that as the author has not invoked the Act, he has thus failed to exhaust domestic remedies.

4.6 With regard to the alleged violation concerning the absence of a right to appeal against the initial summons, the Government refers to the decision on admissibility by the Human Rights Committee in respect of communications Nos. 267/1987 and 245/1987, which raised the same issue. The Government therefore submits that this part of the present communication should be deemed inadmissible.

4.7 The State party contends that the other elements of the applicant's communication are unsubstantiated. It concludes that the author has no claim under article 2 of the Optional Protocol and that his communication should accordingly be declared inadmissible.

5.1 In his reply to the State party's observations the author claims that the Conscientious Objection Act has a limited scope and that it may be invoked only by conscripts who meet the requirements of section 2 of the Act. The author rejects the assertion that section 2 is sufficiently broad to cover the objections maintained by "total objectors" to conscription and substitute civilian service. He argues that the question is not whether the author should have invoked the Conscientious Objection Act, but whether the State party has the right to force the author to become an accomplice to a crime against peace by requiring him to do military service.

5.2 With regard to the exhaustion of domestic remedies, the author explains that he was convicted by the court of first instance and that his appeals to the Supreme Military Court and the Supreme Court of the Netherlands were rejected. He argues, therefore, that the requirement to exhaust domestic remedies has been fully complied with.

5.3 With regard to the State party's proposed amendments to the Conscription Act, the author claims that they are to be withdrawn.

5.4 The author contends that the State party cannot claim that the European Court of Human Rights has confirmed the impartiality and independence of the Netherlands court martial procedure (Military Court).

Committee's decision on admissibility

6.1 During its forty-fourth session the Committee considered the admissibility of the communication. It considered that, since the author had been convicted for his refusal to obey military orders and his appeal against his conviction had been dismissed by the Supreme Court of the Netherlands, the communication met the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

6.2 The Committee considered that the author's contention that the Court had misinterpreted the law and wrongly convicted him, as well as his claims under articles 6 and 7 were inadmissible under article 3 of the Optional Protocol. As regards the author's claim that his rights under article 26 of the Covenant were violated since the Military Penal Code, unlike the Penal Code, made no provisions for an appeal against the summons, the Committee referred to its jurisprudence in case Nos. 245/1987 and 267/1987, b/ and considered that the scope of article 26 could not be extended to cover situations such as the one encountered by the author; this part of the communication was therefore declared inadmissible under article 2 of the Optional Protocol.

6.3 The Committee decided that the author's allegation regarding the differentiation in treatment between Jehovah's Witnesses and conscientious objectors to military and substitute service in general should be examined on the merits.

6.4 The Committee considered that the author's other claims were not substantiated, for purposes of admissibility, and therefore inadmissible under article 2 of the Optional Protocol.

6.5 Accordingly, on 25 March 1992, the Committee declared the communication admissible in so far as the differentiation in treatment between Jehovah's Witnesses and conscientious objectors in general might raise issues under article 26 of the Covenant.

State party's submission on the merits and author's comments

7.1 In its submission, dated 20 November 1992, the State party argues that the distinction between Jehovah's Witnesses and other conscientious objectors to military service is based on objective and reasonable criteria.

7.2 The State party explains that, according to the relevant legal regulations, postponement of initial training can be granted in specific cases where special circumstances exist. A Jehovah's Witness who is eligible for military service is as a rule granted postponement of initial training if his community provides the assurance that he is a baptized member. The State party submits that this postponement is withdrawn if the community informs the Ministry of Defence that the individual concerned no longer is a full member of the community. If the grounds for granting postponement continue to apply, his eligibility for military service will expire when the individual reaches the age of 35.

7.3 To explain the special treatment for Jehovah's Witnesses, the State party states that baptized members form a closed group of people who are obliged, on penalty of expulsion, to observe strict rules of behaviour, applicable to many aspects of their daily life and subject to strict informal social control. According to the State party, one of these rules prohibits the participation in any kind of military or substitute service, while another obliges members to be permanently available for the purpose of spreading the faith.

7.4 The State party concludes that the different treatment of Jehovah's Witnesses does not constitute discrimination against the author, since it is based on reasonable and objective criteria. In this connection, it refers to the case law of the European Commission on Human Rights. c/ The State party moreover argues that the author has not substantiated that he is in a situation comparable to that of Jehovah's Witnesses.

8. In his comments, dated 25 January 1993, on the State party's submission, the author argues that, while the State party accepts membership of Jehovah's Witnesses as sufficient evidence that their objection to military and substitute service is sincere, it does not recognize the unsurmountable objections of other persons which are based on equally strong and genuine convictions. The author argues that the State party, by exempting Jehovah's Witnesses from military and substitute service, protects them against punishment by their own organization, while it sends other total objectors to prison. He further argues that the preparedness of total objectors to go to prison constitutes sufficient evidence of the sincerity of their objections and contends that the differentiation in treatment between Jehovah's Witnesses and other conscientious objectors amounts to discrimination under article 26 of the Covenant.

Examination of merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The issue before the Committee is whether the differentiation in treatment as regards exemption from military service between Jehovah's Witnesses and other conscientious objectors amounts to prohibited discrimination under article 26 of the Covenant. The Committee has noted the State party's argument that the differentiation is based on reasonable and objective criteria, since Jehovah's Witnesses form a closely-knit social group with strict rules of behaviour, membership of which is said to constitute strong evidence that the objections to military and substitute service are based on genuine religious convictions. The Committee notes that there is no legal possibility for other conscientious objectors to be exempted from the service altogether; they are required to do substitute service; when they refuse to do this for reasons of conscience, they are prosecuted and, if convicted, sentenced to imprisonment.

9.3 The Committee considers that the exemption of only one group of conscientious objectors and the inapplicability of exemption for all others cannot be considered reasonable. In this context, the Committee refers to its General Comment on article 18 and emphasizes that, when a right of conscientious objection to military service is recognized by a State party, no differentiation shall be made among conscientious objectors on the basis of the nature of their particular beliefs. However, in the instant case, the Committee considers that the author has not shown that his convictions as a pacifist are incompatible with the system of substitute service in the Netherlands or that the privileged treatment accorded to Jehovah's Witnesses adversely affected his rights as a conscientious objector against military service. The Committee therefore finds that Mr. Brinkhof is not a victim of a violation of article 26 of the Covenant.

9.4 The Committee, however, is of the opinion that the State party should give equal treatment to all persons holding equally strong objections to military and substitute service, and it recommends that the State party review its relevant regulations and practice with a view to removing any discrimination in this respect.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ Publications of the European Court of Human Rights, Series A: Judgements and Decisions, vol. 22, p. 37, para. 89.

b/ R. T. Z. v. the Netherlands, declared inadmissible on 5 November 1987, and M. J. G. v. the Netherlands, declared inadmissible on 24 March 1988.

c/ European Commission on Human Rights, case No. 10410/83, Norenius v. Sweden, decision of 11 October 1984, and case No. 14215/88, Brinkhof v. the Netherlands, decision of 13 December 1989.

T. Communications Nos. 406/1990 and 426/1990, Lahcen B. M. Oulajin and Mohamed Kaiss v. the Netherlands (views adopted on 23 October 1992, forty-sixth session)

Submitted by:	Lahcen B. M. Oulajin and Mohamed Kaiss (represented by counsel)
Alleged victims:	The authors
State party:	The Netherlands
Date of communications:	24 April 1990 and 22 August 1990, respectively
Date of decisions on admissibility:	22 March 1991 and 4 July 1991, respectively

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 October 1992,

Having concluded its consideration of communications Nos. 406/1990 and 426/1990, submitted to the Human Rights Committee by Messrs. Lahcen B. M. Oulajin and Mohamed Kaiss, respectively, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communications, their counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.*

1. The authors of the communications are Lahcen Oulajin and Mohamed Kaiss, Moroccan citizens born on 1 July 1942 and 7 July 1950 respectively, at present residing in Alkmaar, the Netherlands. They claim to be victims of a violation by the Netherlands of articles 17 and 26 of the International Covenant on Civil and Political Rights. They are represented by counsel.

Facts as submitted

2.1 Mr. Oulajin's wife and two children live in Morocco. On 19 October 1981, the author's brother died, leaving four children, born in 1970, 1973, 1976 and 1979. Subsequently, the author's wife in Morocco assumed responsibility for her nephews, with the consent of their mother.

2.2 Mr. Kaiss' wife and child live in Morocco. On 13 July 1979 the author's father died, leaving two young children, born in 1971 and 1974. Subsequently, the author assumed responsibility for the upbringing of his siblings and the children were taken in by the author's family in Morocco.

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* An individual opinion submitted by Mr. Kurt Herndl, Mr. Rein Müllerson, Mr. Birame N'Diaye and Mr. Waleed Sadi is appended.

2.3 The authors, who claim to be the only persons to contribute financially to the support of said relatives, applied for benefits under the Dutch Child Benefit Act (Algemene Kinderbijslagwet) claiming their dependents as foster children. a/ By letters of 7 May 1985 and 2 May 1984 respectively the Alkmaar Board of Labour (Raad van Arbeid) informed the authors that, while they were entitled to a benefit for their own children, they could not be granted a benefit for their siblings and nephews. It held that these children could not be considered to be foster children within the meaning of the Child Benefit Act, since the authors reside in the Netherlands and cannot influence their upbringing, as required under article 7, paragraph 5, of the Act.

2.4 Both authors appealed the decision to the Board of Appeal (Raad van Beroep) in Haarlem. On 19 February 1986 and 6 May 1986, the Board of Appeal rejected the appeals. They then appealed to the Central Board of Appeal (Centrale Raad van Beroep), arguing, inter alia, that because of lack of money, it had become impossible for them to support their foster children and that, as a result, their family life had suffered; they claimed that they formed a family with their foster children within the meaning of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. They furthermore submitted that it would amount to discrimination if they were required to participate actively in the upbringing of the children concerned, as this requirement would be difficult to meet for migrant workers. They added that the requirement did not exist in respect of their own children.

2.5 By decisions of 4 March 1987, the Central Board of Appeal dismissed the appeals. It held, inter alia, that in case of the upbringing of foster children, it was necessary to prove the existence of close links between the children and the applicant for purposes of the entitlement to child benefit. The Central Board of Appeal held that the cases did not raise the question of two similar situations being treated unequally, so that the issue of discrimination did not arise. In holding that a close, exclusive relationship between the children concerned and the individual applying for a child benefit is necessary, it argued that such a close relationship is presumed to exist in respect of one's own children, whereas it must be made plausible in respect of foster children.

2.6 The authors appealed to the European Commission of Human Rights, invoking articles 8 (cf. article 17 of the Covenant) and 14 (cf. article 26 of the Covenant) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. By decision of 6 March 1989, the Commission declared their communications inadmissible ratione materiae, holding that the Convention does not encompass a right to family allowances. In particular, article 8 could not be construed as obliging a State to grant such allowances. The right to family allowances was a social security right that fell outside the scope of the Convention. With regard to the alleged discrimination, the Commission reiterated that article 14 of the European Convention has no independent existence and that it only covers the rights and obligations recognized in the Convention.

Complaint

3.1 The authors contend that the authorities of the Netherlands have violated article 26 of the Covenant. They refer to the Human Rights Committee's General Comment on article 26, which states, inter alia, that the principle of non-discrimination constitutes a basic and general principle relating to the protection of human rights. The authors argue that an inadmissible distinction

is made in their case between "own children" and "foster children", all of which belong to the same family in Morocco.

3.2 The authors point out that the actual situation in which the children concerned live does not differ, and that, de facto, both have the same parents. The Dutch authorities do pay child benefits for natural children separated from their parents and residing abroad, irrespective of whether the parent residing in the Netherlands is involved in the upbringing. The authors therefore consider it unjust to deny benefits for their foster children merely on the basis of the fact that they cannot actively involve themselves in their upbringing. In their opinion, the "differential treatment" is not based on "reasonable and objective" criteria.

3.3 The authors argue that not only "Western standards" should be taken into account in the determination of whether or not to grant child benefits. It was in conformity with Moroccan tradition that they had taken their relatives into their family.

3.4 The authors further allege a violation of article 17 of the Covenant. They state that they are unemployed in the Netherlands and depend on an allowance in accordance with the General Social Security Act. This allowance amounts to the social minimum. The child benefits are essential for them in order to support their family in Morocco. By refusing the child benefits for their foster children, the authors contend, a "family life with them is de facto impossible", thus violating their rights under article 17.

The Committee's considerations and decision on admissibility

4.1 At its forty-first and forty-second sessions, respectively, the Committee considered the admissibility of the communications. It noted that the State party had raised no objection to admissibility, confirming that the authors had exhausted all available domestic remedies. It further noted that the facts as submitted by the authors did not raise issues under article 17 of the Covenant and that this aspect of the communication was therefore inadmissible ratione materiae under article 3 of the Optional Protocol.

4.2 As to the authors' allegations that they were victims of discrimination, the Committee took note of their claim that the distinction made in the Child Benefit Act between natural and foster children is not based on reasonable and objective criteria, and decided to examine this question in the light of the State party's submission on the merits.

4.3 By decision of 23 March 1991, the Committee declared Mr. Oulajin's communication admissible in so far as it might raise issues under article 26 of the Covenant. By decision of 4 July 1991, the Committee similarly declared Mr. Kaiss' communication admissible. On 4 July 1991 the Committee decided to join consideration of the two communications.

State party's clarifications and the authors' comments thereon

5.1 By submission of 30 March 1992, the State party explains that, pursuant to the Child Benefit Act, residents of the Netherlands, regardless of their nationality, receive benefit payments to help cover the maintenance costs of their minor children. Provided certain conditions are met, an applicant may be entitled to a child benefit, not only for his own children, but also for his foster children. The Act lays down the condition that the foster child must be

(a) maintained and (b) brought up by the applicant as if he or she were the applicant's own child.

5.2 The State party submits that the authors' allegations of discrimination raise two issues:

(1) Whether the distinction between an applicant's own children and foster children constitutes a violation of article 26 of the Covenant;

(2) Whether the regulations governing the entitlement to child benefit for foster children, as applied in the Netherlands, result in an unjustifiable disadvantage for non-Dutch nationals, residing in the Netherlands.

5.3 As to the first issue, the State party submits that to be entitled to child benefit for foster children, the applicant must raise the children concerned in a way comparable to that in which parents normally bring up their own children. This requirement does not apply to the applicant's own children. The State party argues that this distinction does not violate article 26 of the Covenant; it submits that the aim of the relevant regulations is to determine, on the basis of objective criteria, whether the relationship between the foster parent and the foster child is so close that it is appropriate to provide child benefit as if the child were the foster parent's own.

5.4 As to the second issue, the State party submits that no data exist to show that the regulations affect migrant workers more than Dutch nationals. It argues that the Act's requirements governing entitlement to child benefit for foster children are applied strictly, regardless of the nationality of the applicant or the place of residence of the foster children. It submits that case law shows that applicants of Dutch nationality, residing in the Netherlands, are also deemed ineligible for child benefit for their foster children who are resident abroad. Moreover, if one or both of the parents are still alive, it is assumed in principle that the natural parent has a parental link with the child, which as a rule prevents the foster parent from satisfying the requirements of the Child Benefit Act.

5.5 Furthermore, the State party argues that, even if proportionally fewer migrant workers than Dutch nationals fulfil the statutory requirements governing entitlement to child benefit for foster children, this does not imply discrimination as prohibited by article 26 of the Covenant. In this connection, it refers to the decision of the Committee in communication No. 212/1986, P. P. C. v. the Netherlands, b/ in which it was held that the scope of article 26 does not extend to differences of results in the application of common rules in the allocation of benefits.

5.6 In conclusion, the State party submits that the statutory regulations concerned are a necessary and appropriate means of achieving the objectives of the Child Benefit Act, i.e. making a financial contribution to the maintenance of children with whom the applicant has a close, exclusive, parental relationship, and do not result in discrimination as prohibited by article 26 of the Covenant.

6.1 In his comments on the State party's observations, counsel maintains his allegation that the distinction between own children and foster children in the Child Benefit Act is discriminatory. He argues that the authors' foster children live in exactly the same circumstances as their own children. In this connection, reference is made to article 24 of the Covenant, which stipulates

that a child is entitled to protection on the part of his family, society and the State without any discrimination as to, inter alia, birth. According to counsel, no distinction can be made between the authors' own and foster children regarding the intensity and exclusivity in the relationship with the authors.

6.2 Counsel further argues that it is evident that this distinction affects foreign employees working in the Netherlands more than Dutch residents, since the foreign employees often choose to leave their family in the country of origin, while there is no such necessity for Dutch residents to leave their family abroad. In this connection, counsel contends that the State party ignores that the Netherlands is to be considered an immigration country.

Examination of the merits

7.1 The Human Rights Committee has considered the present communications in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The question before the Committee is whether the authors are victims of a violation of article 26 of the Covenant, because the authorities of the Netherlands denied them a family allowance for certain of their dependants.

7.3 In its constant jurisprudence, the Committee has held that although a State party is not required by the Covenant on Civil and Political Rights to adopt social security legislation, if it does, such legislation and the application thereof must comply with article 26 of the Covenant. The principle of non-discrimination and equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria. c/

7.4 With respect to the Child Benefit Act, the State party submits that there are objective differences between one's own children and foster children, which justify different treatment under the Act. The Committee recognizes that the distinction is objective and need only focus on the reasonableness criterion. Bearing in mind that certain limitations in the granting of benefits may be inevitable, the Committee has considered whether the distinction between one's own children and foster children under the Child Benefit Act, in particular the requirement that a foster parent be involved in the upbringing of the foster children, as a precondition to the granting of benefits, is unreasonable. In the light of the explanations given by the State party, the Committee finds that the distinctions made in the Child Benefit Act are not incompatible with article 26 of the Covenant.

7.5 The distinction made in the Child Benefit Act between own children and foster children precludes the granting of benefits for foster children who are not living with the applicant foster parent. In this connection, the authors allege that the application of this requirement is, in practice, discriminatory, since it affects migrant workers more than Dutch nationals. The Committee notes that the authors have failed to submit substantiation for this claim and observes, moreover, that the Child Benefit Act makes no distinction between Dutch nationals and non-nationals, such as migrant workers. The Committee considers that the scope of article 26 of the Covenant does not extend to differences resulting from the equal application of common rules in the allocation of benefits.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights,

is of the view that the facts before it do not disclose a violation of any provision of the Covenant.

Notes

a/ For the purposes of this decision, a foster child is considered to be a child whose upbringing has been left to persons other than his or her natural or adoptive parents.

b/ Declared inadmissible on 24 March 1988, para. 6.2.

c/ See Broeks v. the Netherlands, communication No. 172/1984, and Zwaan-de-Vries v. the Netherlands, communication No. 182/1984, views adopted on 9 April 1987, para. 12.4; Vos v. the Netherlands, communication No. 218/1986, views adopted on 29 March 1989, para. 11.3; Pauger v. Austria, communication No. 415/1990, views adopted on 26 March 1992, para. 7.2; Sprenger v. the Netherlands, communication No. 395/1990, views adopted on 31 March 1992, para. 7.2.

Appendix

Individual opinion submitted by Mr. Kurt Herndl, Mr. Rein Müllerson, Mr. Birame N'Diaye and Mr. Waleed Sadi pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's views on communications Nos. 406/1990 and 426/1990, L. Oulajin and M. Kaiss v. the Netherlands

We concur in the Committee's finding that the facts before it do not reveal a violation of article 26 of the Covenant. While referring to the individual opinion attached to the decision concerning Sprenger v. the Netherlands (communication No. 395/1990), a/ we consider it proper to briefly expand on the Committee's rationale, as it appears in these views and in the Committee's views on communications Nos. 172/1984, Broeks v. the Netherlands and 182/1984, Zwaan-de-Vries v. the Netherlands. b/

It is obvious that while article 26 of the Covenant postulates an autonomous right to non-discrimination, the implementation of this right may take different forms, depending on the nature of the right to which the principle of non-discrimination is applied.

With regard to the application of article 26 of the Covenant in the field of economic and social rights, it is evident that social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made are manifestly discriminatory or arbitrary, it is not for the Committee to re-evaluate the complex socio-economic data and substitute its judgement for that of the legislatures of States parties.

Furthermore it would seem to us that it is essential to keep one's sense of proportion. With respect to the present cases, we note that the authors are asking for child benefits not only for their own children - to which they are entitled under the legislation of the Netherlands - but also for siblings, nephews and nieces, for whom they claim to have accepted responsibility and hence consider as dependants. On the basis of the information before the Committee, such demands appear to run counter to a general sense of proportion, and their denial by the government concerned cannot be considered unreasonable in view of the budget limitations which exist in every social security system. While States parties to the Covenant may wish to extend benefits to such wide-ranging categories of dependants, article 26 of the Covenant does not require them to do so.

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ Views adopted on 31 March 1992, forty-fourth session.

b/ Views adopted on 9 April 1987, twenty-ninth session.

U. Communication No. 470/1991, Joseph Kindler v. Canada
(views adopted on 30 July 1993, forty-eighth session)

Submitted by: Joseph Kindler (represented by counsel)

Alleged victim: The author

State party: Canada

Date of communication: 25 September 1991
(initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 July 1993,

Having concluded its consideration of communication No. 470/1991, submitted to the Human Rights Committee by Mr. Joseph Kindler under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its views under article 5, paragraph 4, of the Optional Protocol.*

1. The author of the communication is Joseph Kindler, a citizen of the United States of America, born in 1961, at the time of his submission detained in a penitentiary in Montreal, Canada, and on 26 September 1991 extradited to the United States. He claims to be a victim of a violation of articles 6, 7, 9, 10, 14 and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 In November 1983 the author was convicted in the State of Pennsylvania, United States, of first degree murder and kidnapping; the jury recommended the death sentence. According to the author, this recommendation is binding on the court. In September 1984, prior to sentencing, the author escaped from custody. He was arrested in the province of Quebec in April 1985. In July 1985 the United States requested and in August 1985 the Superior Court of Quebec ordered his extradition.

2.2 Article 6 of the 1976 Extradition Treaty between Canada and the United States provides:

> "When the offence for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offence, extradition may be refused

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* Six individual opinions, signed by seven Committee members, are appended.

unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed".

Canada abolished the death penalty in 1976, except in the case of certain military offences.

2.3 The power to seek assurances that the death penalty will not be imposed is conferred on the Minister of Justice pursuant to section 25 of the 1985 Extradition Act. On 17 January 1986, after hearing the author's counsel, the Minister of Justice decided not to seek these assurances.

2.4 The author filed an application for review of the Minister's decision with the Federal Court, which dismissed the application in January 1987. The author's appeal to the Court of Appeal was rejected in December 1988. The matter then came before the Supreme Court of Canada, which decided on 26 September 1991 that the extradition of Mr. Kindler would not violate his rights under the Canadian Charter of Human Rights. The author was extradited on the same day.

Complaint

3. The author claims that the decision to extradite him violates articles 6, 7, 9, 14 and 26 of the Covenant. He submits that the death penalty per se constitutes cruel and inhuman treatment or punishment, and that conditions on death row are cruel, inhuman and degrading. He further alleges that the judicial procedures in Pennsylvania, inasmuch as they relate specifically to capital punishment, do not meet basic requirements of justice. In this context, the author, who is white, generally alleges racial bias in the imposition of the death penalty in the United States, without, however, substantiating how this alleged bias would affect him.

State party's observations and author's comments

4.1 The State party recalls that the author illegally entered the territory of Canada, where he was arrested in April 1985. It submits that the communication is inadmissible ratione personae, loci and materiae.

4.2 It is argued that the author cannot be considered a victim within the meaning of the Optional Protocol, since his allegations are derived from assumptions about possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States. The State party refers in this connection to the Committee's views in communication No. 61/1979, a/ where it was found that the Committee "has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant".

4.3 The State party indicates that the author's allegations concern the penal law and judicial system of a country other than Canada. It refers to the Committee's inadmissibility decision in communication No. 217/1986, b/ where the Committee observed "that it can only receive and consider communications in respect of claims that come under the jurisdiction of a State party to the Covenant". The State party submits that the Covenant does not impose responsibility upon a State for eventualities over which it has no jurisdiction.

4.4 Moreover, it is submitted that the communication should be declared inadmissible as incompatible with the provisions of the Covenant, since the Covenant does not provide for a right not to be extradited. In this connection, the State party quotes the Committee's inadmissibility decision in communication No. 117/1981: c/ "There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country". It further argues that even if extradition could be found to fall within the scope of protection of the Covenant in exceptional circumstances, these circumstances are not present in the instant case.

4.5 The State party further refers to the United Nations Model Treaty on Extradition, d/ which clearly contemplates the possibility of unconditional surrender by providing for discretion in obtaining assurances regarding the death penalty in the same fashion as is found in article 6 of the Canada-United States Extradition Treaty. It concludes that interference with the surrender of a fugitive pursuant to legitimate requests from a treaty partner would defeat the principles and objects of extradition treaties and would entail undesirable consequences for States refusing these legitimate requests. In this context, the State party points out that its long, unprotected border with the United States would make it an attractive haven for fugitives from United States justice. If these fugitives could not be extradited because of the theoretical possibility of the death penalty, they would be effectively irremovable and would have to be allowed to remain in the country, unpunished and posing a threat to the safety and security of the inhabitants.

4.6 The State party finally submits that the author has failed to substantiate his allegations that the treatment he may face in the United States will violate his rights under the Covenant. In this connection, the State party points out that the imposition of the death penalty is not per se unlawful under the Covenant. As regards the delay between the imposition and the execution of the death sentence, the State party submits that it is difficult to see how a period of detention during which a convicted prisoner would pursue all avenues of appeal, can be held to constitute a violation of the Covenant.

5. In his reply to the State party's submission, the author maintains that, since the right to life is at stake, there is no possible argument for leaving extradition outside the Committee's jurisdiction.

Committee's considerations and decision on admissibility

6.1 During its 45th session in July 1992, the Committee considered the admissibility of the communication. It observed that extradition as such is outside the scope of application of the Covenant, e/ but that a State party's obligations in relation to a matter itself outside the scope of the Covenant may still be engaged by reference to other provisions of the Covenant. f/ The Committee noted that the author does not claim that extradition as such violates the Covenant, but rather that the particular circumstances related to the effects of his extradition would raise issues under specific provisions of the Covenant. Accordingly, the Committee found that the communication was thus not excluded ratione materiae.

6.2 The Committee considered the contention of the State party that the claim is inadmissible ratione loci. Article 2 of the Covenant requires States parties to guarantee the rights of persons within their jurisdiction. If a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's

rights that may later occur in the other jurisdiction. In that sense a State party clearly is not required to guarantee the rights of persons within another jurisdiction. However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.

6.3 The Committee therefore considered itself competent to examine whether the State party is in violation of the Covenant by virtue of its decision to extradite the author under the Extradition Treaty of 1976 between the United States and Canada, and the Extradition Act of 1985.

6.4 The Committee observed that the Covenant does not prohibit capital punishment for the most serious crimes provided that certain conditions are met. Article 7 of the Covenant prohibits torture and cruel, inhuman and degrading treatment. In respect of the so-called "death row phenomenon" the Committee recalled its earlier jurisprudence and noted that "prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment, even if they can be a source of mental strain for the convicted persons." g/ This also applies to appeal and review proceedings in cases involving capital punishment, although an assessment of the particular circumstances of each case would be called for. In States whose judicial system provides for review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies can be necessary to review the sentence. Thus, even prolonged periods of detention under a strict custodial regime on death row could not necessarily be considered to constitute cruel, inhuman and degrading treatment if the convicted person is merely availing himself of appellate remedies. h/ But each case will depend on its own facts.

6.5 The Committee observed further that article 6 provides a limited authorization to States to order capital punishment within their own jurisdiction. It decided to examine on the merits the question whether the scope of the authorization permitted under article 6 extends also to allowing foreseeable loss of life by capital punishment in another State, even one with full procedural guarantees.

6.6 The Committee also found that it is clear from the travaux préparatoires that it was not intended that article 13 of the Covenant, which provides specific rights relating to the expulsion of aliens lawfully in the territory of a State party, should detract from normal extradition arrangements. None the less, whether an alien is required to leave the territory through expulsion or extradition, the general guarantees of article 13 in principle apply, as do the requirements of the Covenant as a whole. In this connection the Committee noted that the author, even though he had unlawfully entered the territory of Canada, had ample opportunity to present his arguments against extradition before the Canadian courts, including the Supreme Court of Canada, which considered the

facts and the evidence before it and found that the extradition of the author would not violate his rights under Canadian or international law. In this context the Committee reiterated its constant jurisprudence that it is not competent to re-evaluate the facts and evidence considered by national courts. What the Committee may do is to verify whether the author was granted all the procedural safeguards provided for in the Covenant. The Committee concluded that a careful study of all the material submitted by the author and by the State party does not reveal arguments that would support a complaint based on the absence of those guarantees during the course of the extradition process.

6.7 The Committee also observed that, in principle, lawful capital punishment under article 6 does not per se raise an issue under article 7. The Committee considered whether there are none the less special circumstances that in this particular case still raise an issue under article 7. Canadian law does not provide for the death penalty, except in military cases. Canada may by virtue of article 6 of the Extradition Treaty seek assurances from the other State which retains the death penalty, that a capital sentence shall not be imposed. It may also, under the Treaty, refuse to extradite a person when such an assurance is not received. While the seeking of such assurances and the determination as to whether or not to extradite in their absence is discretionary under the Treaty and Canadian law, these decisions may raise issues under the Covenant. In particular, the Committee considered that it might be relevant to know whether the State party satisfied itself, before deciding not to invoke article 6 of the Treaty, that this would not involve for the author a necessary and foreseeable violation of his rights under the Covenant.

6.8 The Committee also found that the methods employed for judicial execution of a sentence of capital punishment may in a particular case raise issues under article 7.

7. On 31 July 1992 the Committee decided that the communication was admissible inasmuch as it might raise issues under articles 6 and 7 of the Covenant. The Committee further indicated that, in accordance with rule 93, paragraph 4, of its rules of procedure, the State party could request a review of the decision on admissibility at the time of the examination of the merits of the communication. Two Committee members appended a dissenting opinion to the decision on admissibility. i/

State party's submission on the merits and request for review of admissibility

8.1 In its submissions dated 2 April and 26 May 1993, the State party submits facts on the extradition process in general, on the Canada-United States extradition relationship and on the specifics of the present case. It further requests a review of the Committee's decision on admissibility.

8.2 The State party recalls that "extradition exists to contribute to the safety of the citizens and residents of States. Dangerous criminal offenders seeking a safe haven from prosecution or punishment are removed to face justice in the State in which their crimes were committed. Extradition furthers international cooperation in criminal justice matters and strengthens domestic law enforcement. It is meant to be a straightforward and expeditious process. Extradition seeks to balance the rights of fugitives with the need for the protection of the residents of the two States parties to any given extradition treaty. The extradition relationship between Canada and the United States dates back to 1794 ... In 1842, the United States and Great Britain entered into the

Ashburton-Webster Treaty which contained articles governing the mutual surrender of criminals ... this treaty remained in force until the present Canada-United States Extradition Treaty of 1976."

8.3 With regard to the principle aut dedere aut judicare the State party explains that while some States can prosecute persons for crimes committed in other jurisdictions in which their own nationals are either the offender or the victim, other States, such as Canada and certain other States in the common law tradition, cannot.

8.4 Extradition in Canada is governed by the Extradition Act and the terms of the applicable treaty. The Canadian Charter of Rights and Freedoms, which forms part of the constitution of Canada and embodies many of the rights protected by the Covenant, applies. Under Canadian law extradition is a two step process, the first involving a hearing at which a judge considers whether a factual and legal basis for extradition exists. The person sought for extradition may submit evidence at the judicial hearing. If the judge is satisfied on the evidence that a legal basis for extradition exists, the fugitive is ordered committed to await surrender to the requesting State. Judicial review of a warrant of committal to await surrender can be sought by means of an application for a writ of habeas corpus in a provincial court. A decision of the judge on the habeas corpus application can be appealed to the provincial court of appeal and then, with leave, to the Supreme Court of Canada. The second step in the extradition process begins following the exhaustion of the appeals in the judicial phase. The Minister of Justice is charged with the responsibility of deciding whether to surrender the person sought for extradition. The fugitive may make written submissions to the Minister and counsel for the fugitive, with leave, may appear before the Minister to present oral argument. In coming to a decision on surrender, the Minister considers a complete record of the case from the judicial phase, together with any written and oral submissions from the fugitive, and while the Minister's decision is discretionary, the discretion is circumscribed by law. The decision is based upon a consideration of many factors, including Canada's obligations under the applicable treaty of extradition, facts particular to the person and the nature of the crime for which extradition is sought. In addition, the Minister must consider the terms of the Canadian Charter of Rights and Freedoms and the various instruments, including the Covenant, which outline Canada's international human rights obligations. Finally, a fugitive may seek judicial review of the Minister's decision by a provincial court and appeal a warrant of surrender, with leave, up to the Supreme Court of Canada. In interpreting Canada's human rights obligations under the Canadian Charter, the Supreme Court of Canada is guided by international instruments to which Canada is a party, including the Covenant.

8.5 With regard to surrender in death penalty cases, the Minister of Justice decides whether or not to request assurances on the basis of an examination of the particular facts of each case. The Canada-United States Extradition Treaty was not intended to make the seeking of assurances a routine occurrence but only in circumstances where the particular facts of the case warrant a special exercise of discretion.

8.6 With regard to the abolition of the death penalty in Canada, the State party notes that "A substantial number of States within the international community, including the United States, continue to impose the death penalty. The Government of Canada does not use extradition as a vehicle for imposing its concepts of criminal law policy on other States. By seeking assurances on a routine basis, in the absence of exceptional circumstances, Canada would be

dictating to the requesting State, in this case the United States, how it should punish its criminal law offenders. The Government of Canada contends that this would be an unwarranted interference with the internal affairs of another State. The Government of Canada reserves the right ... to refuse to extradite without assurances. This right is held in reserve for use only where exceptional circumstances exist. In the view of the Government of Canada, it may be that evidence showing that a fugitive would face certain or foreseeable violations of the Covenant would be one example of exceptional circumstances which would warrant the special measure of seeking assurances under article 6. However, there was no evidence presented by Kindler during the extradition process in Canada and there is no evidence in this communication to support the allegations that the use of the death penalty in the United States generally, or in the State of Pennsylvania in particular, violates the Covenant."

8.7 The State party also refers to article 4 of the United Nations Model Treaty on Extradition, which lists optional, but not mandatory, grounds for refusing extradition: "(d) If the offence for which extradition is requested carries the death penalty under the law of the Requesting State, unless the State gives such assurance as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out." Similarly, article 6 of the Canada-United States Extradition Treaty provides that the decision with respect to obtaining assurances regarding the death penalty is discretionary.

8.8 With regard to the link between extradition and the protection of society, the State party submits that Canada and the United States share a 4,800 kilometre unguarded border, that many fugitives from United States justice cross that border into Canada and that in the last twelve years there has been a steadily increasing number of extradition requests from the United States. In 1980 there were 29 such requests; by 1992 the number had increased to 83. "Requests involving death penalty cases are a new and growing problem for Canada ... a policy of routinely seeking assurances under article 6 of the Canada-United States Extradition Treaty will encourage even more criminal law offenders, especially those guilty of the most serious of crimes, to flee the United States for Canada. Canada does not wish to become a haven for the most wanted and dangerous criminals from the United States. If the Covenant fetters Canada's discretion not to seek assurances, increasing numbers of criminals may come to Canada for the purpose of securing immunity from capital punishment."

9.1 With respect to Mr. Kindler's case, the State party recalls that he challenged the warrant of committal and the warrant of surrender in accordance with the extradition process outlined above, and that his counsel made written and oral submissions to the Minister to seek assurances that the death penalty not be imposed. He argued that extradition to face the death penalty would offend his rights under section 7 (comparable to articles 6 and 9 of the Covenant) and section 12 (comparable to article 7 of the Covenant) of the Canadian Charter of Rights and Freedoms.

9.2 As to the Committee's admissibility decision, the State party reiterates its argument that the communication is inadmissible <u>ratione materiae</u> because extradition <u>per se</u> is beyond the scope of the Covenant. A review of the <u>travaux préparatoires</u> reveals that the drafters of the Covenant specifically considered and rejected a proposal to deal with extradition in the Covenant. In the light of the negotiating history of the Covenant, the State party submits that "a decision to extend the Covenant to extradition treaties or to individual decisions pursuant thereto would stretch the principles governing the

interpretation of human rights instruments in unreasonable and unacceptable ways. It would be unreasonable because the principles of interpretation which recognize that human rights instruments are living documents and that human rights evolve over time cannot be employed in the face of express limits to the application of a given document. The absence of extradition from the articles of the Covenant when read with the intention of the drafters must be taken as an express limitation."

9.3 As to the merits, the State party stresses that Mr. Kindler enjoyed a full hearing on all matters concerning his extradition to face the death penalty. "If it can be said that the Covenant applies to extradition at all ... an extraditing State could be said to be in violation of the Covenant only where it returned a fugitive to certain or foreseeable treatment or punishment, or to judicial procedures which in themselves would be a violation of the Covenant." In the present case, the State party submits that whereas it was reasonably foreseeable that Mr. Kindler would be held in the State of Pennsylvania subject to a sentence of death, it was not reasonably foreseeable that he would in fact be put to death or be held in conditions of incarceration that would violate rights under the Covenant. The State party points out that Mr. Kindler is entitled to many avenues of appeal in the United States and that he can petition for clemency; furthermore, he is entitled to challenge in the courts of the United States the conditions under which he is held while his appeals with respect to the death penalty are outstanding.

9.4 As to the imposition of the death penalty in the United States, the State party recalls that article 6 of the Covenant did not abolish capital punishment under international law. "In countries which have not abolished the death penalty, the sentence of death may still be imposed for the most serious crimes in accordance with law in force at the time of the commission of the crime, not contrary to the provisions of the Covenant and not contrary to the Convention on the Prevention and Punishment of the Crime of Genocide. The death penalty can only be carried out pursuant to a final judgment rendered by a competent court. It may be that Canada would be in violation of the Covenant if it extradited a person to face the possible imposition of the death penalty where it was reasonably foreseeable that the requesting State would impose the death penalty under circumstances which would violate article 6. That is, it may be that an extraditing State would be violating the Covenant to return a fugitive to a State which imposed the death penalty for other than the most serious crimes, or for actions which are not contrary to a law in force at the time of commission, or which carried out the death penalty in the absence of or contrary to the final judgment of a competent court. Such are not the facts here ... Kindler did not place any evidence before the Canadian courts, before the Minister of Justice or before the Committee which would suggest that the United States was acting contrary to the stringent criteria established by article 6 when it sought his extradition from Canada ... The Government of Canada, in the person of the Minister of Justice, was satisfied at the time the order of surrender was issued that if Kindler is executed in the State of Pennsylvania, this will be within the conditions expressly prescribed by article 6 of the Covenant. The Government of Canada remains satisfied that this is so."

9.5 Finally, the State party observes that it is "in a difficult position attempting to defend the criminal justice system of the United States before the Committee. It contends that the Optional Protocol process was never intended to place a State in the position of having to defend the laws or practices of another State before the Committee."

9.6 With respect to the issue whether the death penalty violates article 7 of the Covenant, the State party submits that "article 7 cannot be read or interpreted without reference to article 6. The Covenant must be read as a whole and its articles as being in harmony ... It may be that certain forms of execution are contrary to article 7. Torturing a person to death would seem to fall into this category as torture is a violation of article 7. Other forms of execution may be in violation of the Covenant because they are cruel, inhuman or degrading. However, as the death penalty is permitted within the narrow parameters set by article 6, it must be that some methods of execution exist which would not violate article 7."

9.7 As to the methods of execution, the State party indicates that the method of execution in Pennsylvania is lethal injection, which is the method proposed by those who advocate euthanasia for terminally ill patients. It is thus at the end of the spectrum of methods designed to cause the least pain.

9.8 As to the "death row phenomenon" the State party submits that each case must be examined on its facts, including the conditions in the prison in which the prisoner would be held while on "death row", the age and the mental and physical condition of the prisoner subject to those conditions, the reasonably foreseeable length of time the prisoner would be subject to those conditions, the reasons underlying the length of time and the avenues, if any, for remedying unacceptable conditions. "Mr. Kindler argued before the Minister of Justice and in Canadian courts that conditions on 'death row' in the State of Pennsylvania would amount to a denial of his rights. His evidence consisted of some testimony and academic journal articles on the effect that electrocution, as a method of execution, was alleged to have on the psychological state of prisoners held on death row. He did not present evidence on the facilities or prison routines in the State of Pennsylvania ... he did not present evidence on his plans to contest the death sentence in the United States and the expected length of time he would be held awaiting a final answer from the courts of the United States. He did not present evidence that he intended to seek a commutation of his sentence. The evidence he did tender was considered by the courts and by the Minister of Justice but was judged insubstantial and therefore insufficient to reverse the premises underlying the extradition relationship in existence between Canada and the United States. The Government of Canada submits that the Minister of Justice and the Canadian courts in the course of the extradition process in Canada, with its two phases of decision-making and avenues for judicial review, examined and weighed all the allegations and facts presented by Kindler. The Minister of Justice, in deciding to surrender Kindler to face the possible imposition of the death penalty, considered all the factors. The Minister was not convinced on the evidence that the conditions of incarceration in the State of Pennsylvania, when considered with the reasons for the delay and the continuing access to the courts in the United States, would violate the rights of Kindler, either under the Canadian Charter of Rights and Freedoms or under the Covenant. The Canadian Supreme Court upheld the Minister's decision, making it clear that the decision was not seen as subjecting Kindler to a violation of his rights ... The Minister of Justice and the Canadian courts came to the conclusion that Kindler would not be subjected to a violation of rights which can be expressed as 'death row phenomenon'. The Government of Canada contends that the extradition process and its result in the case of Kindler satisfied Canada's obligation in respect of the Covenant on this point."

Comments by author's counsel

10.1 In his comments on the State party's submission, author's counsel argues that whereas article 6 of the Covenant does foresee the possibility of the imposition of the death penalty, article 6, paragraph 2, applies only to countries "which have not abolished the death penalty". Since Canada has abolished capital punishment in non-military law, the principle applies that one cannot do indirectly what one cannot do directly, and that Canada was required to demand guarantees that Mr. Kindler would not be executed and that he would be treated in accordance with article 7 of the Covenant.

10.2 Author's counsel refers to the factum presented to the Canadian Supreme Court on Mr. Kindler's behalf. In said factum, the relevant aspects of Canadian Constitutional and Administrative law are discussed, and the arguments are said to be applicable mutatis mutandis to articles 6 and 7 of the Covenant. In paragraphs 38 to 49 of the factum, author's counsel argues that the United States use of the death penalty is not compatible with the standards of the Covenant. He refers to a book by Zimring and Hawkings, Capital Punishment and the American Agenda (1986), which argues the absence of any deterrent effect and the essentially vengeance-based motives for the resurgence of capital punishment in the United States. He also quotes extensively from the judgment of the European Court of Justice in the Soering v. United Kingdom case. He indicates that while the majority Court declined to find capital punishment per se cruel and unusual in every case, it did condemn the death row phenomenon as such. The European Court concluded:

> "For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of the Virginia trial, sentencing and appeal procedures in particular are beyond doubt. The Court agrees with the Commission that the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for psychiatric services ... However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration."

10.3 Counsel further quotes from the concurring opinion of Judge DeMeyer, arguing that "No State Party to the Convention can in that context, even if it has not yet ratified the Sixth Protocol, be allowed to extradite any person if that person thereby incurs the risk of being put to death in the requesting State."

10.4 Counsel also quotes from numerous articles analysing the Soering decision, including one by Gino J. Naldi of the University of East Anglia:

"The Court considered whether the death penalty violated article 3. The Court noted that as originally drafted, the Convention did not seek to prohibit the death penalty. However, subsequent national practice meant that few High Contracting Parties now retained it and this was reflected in Protocol No. 6 which provides for the abolition of the death penalty but which the United Kingdom has not ratified notwithstanding its virtual abolition of the death penalty. Yet the very existence of this Protocol led the Court to the conclusion that article 3 had not developed in such a manner that it could be interpreted as prohibiting the death penalty ...

"In the present case the Court found that Soering's fears that he would be exposed to the 'death row phenomenon' were real ... The fact that a condemned prisoner was subjected to the severe regime of death row in a high security prison for six to eight years, notwithstanding psychological and psychiatric services, compounded the problem ... The Court was additionally influenced by Soering's age and mental condition. Soering was eighteen years old at the time of the murders in 1985 and in view of a number of international instruments prohibiting the imposition of the death penalty on minors ... the Court expressed the opinion that a general principle now exists that the youth of a condemned person is a significant factor to be taken into account ... Another factor the Court found relevant was psychiatric evidence that Soering was mentally disturbed at the time of the crime. The Court was also influenced by the fact that Soering's extradition was sought by the Federal Republic of Germany whose constitution allows its nationals to be tried for offences committed in other countries but prohibits the death penalty. Soering could therefore be tried for his alleged crimes without being exposed to the 'death row phenomenon'." j/

10.5 Counsel contests the argument by the State party that Mr. Kindler was not a minor at the time of the offence. "It is not sufficient to state that Mr. Kindler is not a minor and is charged with a serious offence because in a society in which minors and mentally defective citizens can be executed, the access to a pardon is almost non-existent for someone like Mr. Kindler; yet the right to apply for pardon is an essential one in the Covenant."

10.6 Counsel further contends that the Canadian Minister of Justice did not consider the issue of the "death row phenomenon" or the period of time or the conditions of "death row".

10.7 He points to works of law and political science favouring abolition, which are permeated by the horror at the thought of execution and the sense of cruelty which always accompanies it.

10.8 The fact that the Covenant provides for capital punishment for serious offenses does not prevent an evolution in the interpretation of the law. "By now capital punishment must be viewed as <u>per se</u> cruel and unusual, and as a violation of sections 6 and 7 of the Covenant in all but the most horrendous cases of heinous crime; it can no longer be accepted as the standard penalty for murder; thus except for those unusual cases, the Covenant does not authorize it. In this context, executing Mr. Kindler would <u>by itself</u> be a violation of sections 6 and 7 and he should not have been extradited without guarantees."

10.9 With regard to Canada's argument that it does not wish to become a haven for foreign criminals, counsel contends that there is no proof that this would happen, nor was such proof advanced at any time in the proceedings.

11. As to the admissibility of the communication, counsel rejects the State party's arguments as unfounded. In particular, he contends that "it is not logical to exclude extradition from the Covenant or to require certainty of execution as Canada suggests ... law almost never deals with certainties but only with probabilities and possibilities." He stresses "that there is plenty of evidence that, with respect to the death sentence, the legal system of the United States is not in conformity with the Covenant and that therefore, applying its own principles ..., Canada should have considered all the issues raised by Mr. Kindler. It is thus not possible for Canada to argue that Mr. Kindler's petition was inadmissible; he alleged Canada's repeated violation of the Covenant, not that of the United States; that the American system might be indirectly affected is no concern for Canada."

Review of admissibility and consideration of the merits

12.1 In his initial submission author's counsel claimed that Mr. Kindler was a victim of violations of articles 6, 7, 9, 10, 14 and 26 of the Covenant.

12.2 When the Committee, at its forty-fifth session, examined the admissibility of the communication, it found some of the author's allegations unsubstantiated and therefore inadmissible; it further considered that the communication raised new and complex questions with regard to the compatibility with the Covenant, ratione materiae, of extradition to face capital punishment, in particular with regard to the scope of articles 6 and 7 of the Covenant to such situations and their concrete application in the present case. It therefore declared the communication admissible inasmuch as it might raise issues under articles 6 and 7 of the Covenant. The State party has made extensive new submissions on both admissibility and merits and requested, pursuant to rule 93, paragraph 4, of the Committee's rules of procedure, a review of the Committee's decision on admissibility.

12.3 In reviewing its decision on admissibility, the Committee takes note of the objections of the State party and of the arguments by author's counsel in this respect. The Committee observes that with regard to the scope of articles 6 and 7 of the Covenant, the Committee's jurisprudence is not dispositive on issues of admissibility such as those raised in the instant communication. Therefore, the Committee considers that an examination on the merits of the communication will enable the Committee to pronounce itself on the scope of these articles and to clarify the applicability of the Covenant and Optional Protocol to cases concerning extradition to face capital punishment.

13.1 Before examining the merits of this communication, the Committee observes that, as indicated in the admissibility decision, what is at issue is not whether Mr. Kindler's rights have been or are likely to be violated by the United States, which is not a party to the Optional Protocol, but whether by extraditing Mr. Kindler to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant. States parties to the Covenant will often also be party to various bilateral obligations, including those under extradition treaties. A State party to the Covenant is required to ensure that it carries out all its other legal commitments in a manner consistent with the Covenant. The starting point for an examination of this issue must be the obligation of the State party under article 2, paragraph 1, of the Covenant, namely, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most essential of these rights.

13.2 If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.

14.1 With regard to a possible violation by Canada of article 6 the Covenant by its decision to extradite the author, two related questions arise:

(a) Did the requirement under article 6, paragraph 1, to protect the right to life prohibit Canada from exposing a person within its jurisdiction to the real risk (that is to say, a necessary and foreseeable consequence) of losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of extradition to the United States?

(b) Did the fact that Canada had abolished capital punishment except for certain military offences require Canada to refuse extradition or request assurances from the United States, as it was entitled to do under article 6 of the Extradition Treaty, that the death penalty would not be imposed against Mr. Kindler?

14.2 As to (a), the Committee recalls its General Comment on article 6, k/ which provides that while States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use. The General Comment further notes that the terms of article 6 also point to the desirability of abolition of the death penalty. This is an object towards which ratifying parties should strive: "All measures of abolition should be considered as progress in the enjoyment of the right to life". Moreover, the Committee notes the evolution of international law and the trend towards abolition, as illustrated by the adoption by the United Nations General Assembly of the Second Optional Protocol to the International Covenant on Civil and Political Rights. Furthermore, even where capital punishment is retained by States in their legislation, many of them do not exercise it in practice.

14.3 The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Canada itself did not impose the death penalty on Mr. Kindler, but extradited him to the United States, where he faced capital punishment. If Mr. Kindler had been exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, that would have entailed a violation by Canada of its obligations under article 6, paragraph 1. Among the requirements of article 6, paragraph 2, is that capital punishment be imposed only for the most serious crimes, in circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgment rendered by a competent court. The Committee notes that Mr. Kindler was convicted of premeditated murder, undoubtedly a very serious crime. He was over 18 years of age when the crime was committed. The author has not claimed before the Canadian courts or before the Committee that the conduct of the trial in the Pennsylvania court violated his rights to a fair hearing under article 14 of the Covenant.

14.4 Moreover, the Committee observes that Mr. Kindler was extradited to the United States following extensive proceedings in the Canadian courts, which reviewed all the evidence submitted concerning Mr. Kindler's trial and conviction. In the circumstances, the Committee finds that the obligations arising under article 6, paragraph 1, did not require Canada to refuse the author's extradition.

14.5 The Committee notes that Canada has itself, save for certain categories of military offences, abolished capital punishment; it is not, however, a party to the Second Optional Protocol to the Covenant. As to question (b), namely whether the fact that Canada has generally abolished capital punishment, taken together with its obligations under the Covenant, required it to refuse extradition or to seek the assurances it was entitled to seek under the extradition treaty, the Committee observes that the abolition of capital punishment does not release Canada of its obligations under extradition treaties. However, it is in principle to be expected that, when exercising a permitted discretion under an extradition treaty (namely, whether or not to seek assurances that capital punishment will not be imposed) a State which has itself abandoned capital punishment would give serious consideration to its own chosen policy in making its decision. The Committee observes, however, that the State party has indicated that the possibility to seek assurances would normally be exercised where exceptional circumstances existed. Careful consideration was given to this possibility.

14.6 While States must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances. The Committee notes that the extradition of Mr. Kindler would have violated Canada's obligations under article 6 of the Covenant, if the decision to extradite without assurances would have been taken arbitrarily or summarily. The evidence before the Committee reveals, however, that the Minister of Justice reached a decision after hearing argument in favour of seeking assurances. The Committee further takes note of the reasons given by Canada not to seek assurances in Mr. Kindler's case, in particular, the absence of exceptional circumstances, the availability of due process, and the importance of not providing a safe haven for those accused of or found guilty of murder.

15.1 As regards the author's claims that Canada violated article 7 of the Covenant, this provision must be read in the light of other provisions of the Covenant, including article 6, paragraph 2, which does not prohibit the imposition of the death penalty in certain limited circumstances. Accordingly, capital punishment as such, within the parameters of article 6, paragraph 2, does not <u>per se</u> violate article 7.

15.2 As to whether the "death row phenomenon" associated with capital punishment, constitutes a violation of article 7, the Committee recalls its jurisprudence to the effect that "prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies." <u>l</u>/ The Committee has indicated that the facts and the circumstances of each case need to be examined to see whether an issue under article 7 arises.

15.3 In determining whether, in a particular case, the imposition of capital punishment could constitute a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent. In this context the Committee has had careful regard to the judgment given by the European Court of Human Rights in the <u>Soering v. United Kingdom</u> case. <u>m</u>/ It notes that important facts leading to the judgment of the European Court are distinguishable on material points from the facts in the present case. In particular, the facts differ as to the age

and mental state of the offender, and the conditions on death row in the respective prison systems. The author's counsel made no specific submissions on prison conditions in Pennsylvania, or about the possibility or the effects of prolonged delay in the execution of sentence; nor was any submission made about the specific method of execution. The Committee has also noted in the Soering case that, in contrast to the present case, there was a simultaneous request for extradition by a State where the death penalty would not be imposed.

16. Accordingly, the Committee concludes that the facts as submitted in the instant case do not reveal a violation of article 6 of the Covenant by Canada. The Committee also concludes that the facts of the case do not reveal a violation of article 7 of the Covenant by Canada.

17. The Committee expresses its regret that the State party did not accede to the Special Rapporteur's request under rule 86, made in connection with the registration of the communication on 26 September 1991.

18. The Committee, acting under article 5, paragraph 4, of the Optional Protocol, finds that the facts before it do not reveal a violation by Canada of any provision of the International Covenant on Civil and Political Rights.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ Leo Herzberg et al. v. Finland, views adopted on 2 April 1982, para. 9.3.

b/ H. v.d.P. v. the Netherlands, declared inadmissible on 8 April 1987, para. 3.2.

c/ M. A. v. Italy, declared inadmissible on 10 April 1984, para. 13.4.

d/ Adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990; see General Assembly resolution 45/168 of 14 December 1990.

e/ Communication No. 117/1981 (M. A. v. Italy), paragraph 13.4: "There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country".

f/ Aumeeruddy-Cziffra et al. v. Mauritius (No. 35/1978, views adopted on 9 April 1981) and Torres v. Finland (No. 291/1988, views adopted on 2 April 1990).

g/ Views on communications Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica) adopted on 6 April 1989, para. 13.6.

h/ Views on communications Nos. 270/1988 and 271/1988 (Randolph Barrett & Clyde Sutcliffe v. Jamaica), adopted on 30 March 1992, para. 8.4.

i/ See appendix under A.

i/ Gino J. Naldi, Death Row Phenomenon Held Inhuman Treatment, The Review (International Commission of Jurists), December 1989, pp. 61-62.

k/ General Comment No. 6 [16] of 27 July 1982, para. 6.

l/ Howard Martin v. Jamaica, No. 317/1988, views adopted on 24 March 1993, para. 12.2.

m/ European Court of Human Rights, judgement of 7 July 1989.

Appendix

Individual opinions submitted pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's views on communication No. 470/1991 (Joseph Kindler v. Canada)

A. Individual opinion by Mr. Kurt Herndl and Mr. Waleed Sadi (concurring on the merits/dissenting on admissibility)

We fully concur in the Committee's finding that the facts of this case do not reveal a violation by Canada of any provision of the Covenant. We wish, however, to repeat our concerns expressed in the dissenting opinion we appended to the Committee's decision on admissibility of 31 July 1992:

"[...]

3. This communication in its essence poses a threat to the exercise by a State of its international law obligations under a valid extradition treaty. Indeed, an examination of the travaux préparatoires of the Covenant on Civil and Political Rights reveals that the drafters gave due consideration to the complex issue of extradition and decided to exclude this issue from the Covenant, not by accident, but because there were many delegations opposed to interference with their governments' international law obligations under extradition treaties.

4. Yet, in the light of the evolution of international law, in particular of human rights law, following the entry into force of the Covenant in 1976, the question arises whether under certain exceptional circumstances the Human Rights Committee could or even should examine matters directly linked with a State party's compliance with an extradition treaty. Such exceptional circumstances would be present if, for instance, a person were facing arbitrary extradition to a country where substantial grounds existed for believing that he or she could be subjected, for example, to torture. In other words, the Committee could declare communications involving the extradition of a person from a State party to another State (irrespective of whether it is a State party), admissible ratione materiae and ratione loci, provided that the author substantiated his claim that his basic human rights would be violated by the country seeking his extradition; this requires a showing of reasonable cause to believe that such violations would probably occur. In the communication at bar, the author has not made such a showing, and the State party has argued that the Extradition Treaty with the United States is not incompatible with the provisions of the Covenant and that it complies with the requirements of the Model Treaty on Extradition produced at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana in 1990.

5. The majority opinion nevertheless declared this communication admissible, albeit provisionally, because it views the extradition of the author by Canada to Pennsylvania as possibly raising issues under articles 6 and 7 of the Covenant. Yet, the facts as presented to the Committee do not disclose any probability that violations of the author's Covenant rights by a State party to the Optional Protocol would occur. As an alien who illegally entered the territory of Canada, his only link with Canada is that in 1985 he was committed for extradition and that the legality of his extradition was tested in the Canadian courts and, following due

consideration of his arguments, affirmed by the Supreme Court of Canada in September 1991. The author does not raise any complaint about a denial of due process in Canada. His allegations concern hypothetical violations of his rights by the United States, which is not a State party to the Optional Protocol. In our opinion, the 'link' with the State party is much too tenuous for the Committee to declare the communication admissible. Moreover, Mr. Kindler, who was extradited to the United States in September 1991, is still appealing his conviction before the Pennsylvania courts. In this connection, an unreasonable responsibility is being placed on Canada by requiring it to defend, explain or justify before the Committee the United States system of administration of justice.

6. Hitherto, the Committee has declared numerous communications inadmissible, where the authors had failed to substantiate their allegations for purposes of admissibility. A careful examination of the material submitted by author's counsel in his initial submission and in his comments on the State party's submission reveals that this is essentially a case where a deliberate attempt is made to avoid application of the death penalty, which still remains a legal punishment under the Covenant. Here the author has not substantiated his claim that his rights under the Covenant would, with a reasonable degree of probability, be violated by his extradition to the United States.

7. As for the issues the author alleges may arise under article 6, the Committee concedes that the Covenant does not prohibit the imposition of the death penalty for the most serious crimes. Indeed, if it did prohibit it, the Second Optional Protocol on the Abolition of the Death Penalty would be superfluous. Since neither Canada nor the United States is a party to the Second Optional Protocol, it cannot be expected of either State that they ask for or that they give assurances that the death penalty will not be imposed. The question whether article 6, paragraph 2, read in conjunction with article 6, paragraph 1, could lead to a different conclusion is, at best, academic and not a proper matter for examination under the Optional Protocol.

8. As for the issues that may allegedly arise under article 7 of the Covenant, we agree with the Committee's reference to its jurisprudence in the views on communications Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica) and Nos. 270 and 271/1988 (Barrett and Sutcliffe v. Jamaica), in which the Committee decided that the so-called 'death row phenomenon' does not per se constitute cruel, inhuman and degrading treatment, even if prolonged judicial proceedings can be a source of mental strain for the convicted prisoners. In this connection it is important to note that the prolonged periods of detention on death row are a result of the convicted person's recourse to appellate remedies. In the instant case the author has not submitted any arguments that would justify the Committee's departure from its established jurisprudence.

9. A second issue allegedly arising under article 7 is whether the method of execution - in the State of Pennsylvania by lethal injection - could be deemed as constituting cruel, inhuman or degrading treatment. Of course, any and every form of capital punishment can be seen as entailing a denial of human dignity; any and every form of execution can be perceived as cruel and degrading. But, since capital punishment is not prohibited by the Covenant, article 7 must be interpreted in the light of article 6, and cannot be invoked against it. The only conceivable exception would be if

the method of execution were deliberately cruel. There is, however, no indication that execution by lethal injection inflicts more pain or suffering than other accepted methods of execution. Thus, the author has not made a prima facie case that execution by lethal injection may raise an issue under article 7.

10. We conclude that the author has failed to substantiate a claim under article 2 of the Optional Protocol, that the communication raises only remote issues under the Covenant and therefore that it should be declared inadmissible under article 3 of the Optional Protocol as an abuse of the right of submission."

K. Herndl

W. Sadi

[Done in English, French and Spanish, the English text being the original version.]

B. Individual opinion submitted by Mr. Bertil Wennergren (dissenting)

I cannot share the Committee's views on a non-violation of article 6 of the Covenant. In my opinion, Canada violated article 6, paragraph 1, of the Covenant by extraditing the author to the United States, without having sought assurances for the protection of his life, i.e. non-execution of a death sentence imposed upon him. I justify this conclusion as follows:

Firstly, I would like to clarify my interpretation of article 6 of the Covenant. The Vienna Convention on the Law of Treaties stipulates that a treaty must be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The object of the provisions of article 6 is human life and the purpose of its provisions is the protection of such life. Thus, paragraph 1 emphasizes this point by guaranteeing to every human being the inherent right to life. The other provisions of article 6 concern a secondary and subordinate object, namely to allow States parties that have not abolished capital punishment to resort to it until such time they feel ready to abolish it. In the travaux préparatoires to the Covenant, the death penalty was seen by many delegates and bodies participating in the drafting process an "anomaly" or a "necessary evil". Against this background, it would appear to be logical to interpret the fundamental rule in article 6, paragraph 1, in a wide sense, whereas paragraph 2, which addresses the death penalty, should be interpreted narrowly. The principal difference between my and the Committee's views on this case lies in the importance I attach to the fundamental rule in paragraph 1 of article 6, and my belief that what is said in paragraph 2 about the death penalty has a limited objective that cannot by any reckoning override the cardinal principle in paragraph 1.

The rule in article 6, paragraph 1, of the Covenant stands out from among the others laid down in article 6; moreover, article 4 of the Covenant makes it clear that no derogations from this rule are permitted, not even in time of a public emergency threatening the life of the nation. No society, however, has postulated an absolute right to life. All human rights, including the right to life, are subject to the rule of necessity. If, but only if, absolute necessity so requires, it may be justifiable to deprive an individual of his life to prevent him from killing others or so as to avert man-made disasters. For the same reason, it is justifiable to send citizens into war and thereby expose them to a real risk of their being killed. In one form or another, the rule of necessity is inherent in all legal systems; the legal system of the Covenant is no exception.

Article 6, paragraph 2, makes an exception for States parties that have not abolished the death penalty. The Covenant permits them to continue applying the death penalty. This "dispensation" for States parties should not be construed as a justification for the deprivation of the life of individuals, albeit lawfully sentenced to death, and does not make the execution of a death sentence strictly speaking legal. It merely provides a possibility for States parties to be released from their obligations under articles 2 and 6 of the Covenant, namely to respect and to ensure to all individuals within their territory and under their jurisdiction the inherent right to life without any distinction, and enables them to make a distinction with regard to persons having committed the "most serious crime(s)".

The standard way to ensure the protection of the right to life is to criminalize the killing of human beings. The act of taking human life is normally subsumed under terms such as "manslaughter", "homicide" or "murder". Moreover, there may be omissions which can be subsumed under crimes involving the intentional taking of life, inaction or omission that causes the loss of a person's life, such as a doctor's failure to save the life of a patient by intentionally failing to activate life-support equipment, or failure to come to the rescue of a person in a life-threatening situation of distress. Criminal responsibility for the deprivation of life lies with private persons and representatives of the State alike. The methodology of criminal legislation provides some guidance when assessing the limits for a State party's obligations under article 2, paragraph 1, of the Covenant, to protect the right to life within its jurisdiction.

What article 6, paragraph 2, does not, in my view, is to permit States parties that have abolished the death penalty to reintroduce it at a later stage. In this way, the "dispensation" character of paragraph 2 has the positive effect of preventing a proliferation of the deprivation of peoples' lives through the execution of death sentences among States parties to the Covenant. The Second Optional Protocol to the Covenant was drafted and adopted so as to encourage States parties that have not abolished the death penalty to do so.

The United States has not abolished the death penalty and therefore may, by operation of article 6, paragraph 2, deprive individuals of their lives by the execution of death sentences lawfully imposed. The applicability of article 6, paragraph 2, in the United States should not however be construed as extending to other States when they must consider issues arising under article 6 of the Covenant in conformity with their obligations under article 2, paragraph 1, of the Covenant. The "dispensation" clause of paragraph 2 applies merely domestically and as such concerns only the United States, as a State party to the Covenant.

Other States, however, are in my view obliged to observe their duties under article 6, paragraph 1, namely to protect the right to life. Whether they have or have not abolished capital punishment does not, in my opinion, make any difference. The dispensation in paragraph 2 does not apply in this context. Only the rule in article 6, paragraph 1, applies, and it must be applied strictly. A State party must not defeat the purpose of article 6, paragraph 1, by failing to provide anyone with such protection as is necessary to prevent his/her right to life from being put at risk. And under article 2, paragraph 1, of the Covenant, protection shall be ensured to <u>all</u> individuals without distinction of any kind. No distinction must therefore be made on the ground, for instance, that a person has committed a "most serious crime".

The value of life is immeasurable for any human being, and the right to life enshrined in article 6 of the Covenant is the supreme human right. It is an obligation of States parties to the Covenant to protect the lives of all human beings on their territory and under their jurisdiction. If issues arise in respect of the protection of the right to life, priority must not be accorded to the domestic laws of other countries or to (bilateral) treaty articles. Discretion of any nature permitted under an extradition treaty cannot apply, as there is no room for it under Covenant obligations. It is worth repeating that

no derogation from a State's obligations under article 6, paragraph 1, is permitted. This is why Canada, in my view, violated article 6, paragraph 1, by consenting to extradite Mr. Kindler to the United States, without having secured assurances that Mr. Kindler would not be subjected to the execution of a death sentence.

B. Wennergren

[Done in English, French and Spanish, the English text being the original version.]

C. Individual opinion submitted by Mr. Rajsoomer Lallah (dissenting)

1. I am unable to subscribe to the Committee's views to the effect that the facts before it do not disclose a violation by Canada of any provision of the Covenant.

2.1 I start by affirming my agreement with the Committee's opinion, as noted in paragraph 13.1 of the views, that what is at issue is not whether Mr. Kindler's rights have been, or run the real risk of being, violated in the United States and that a State party to the Covenant is required to ensure that it carries out other commitments it may have under a bilateral treaty in a manner consistent with its obligations under the Covenant. I further agree with the Committee's view, in paragraph 13.2, to the effect that, where a State party extradites a person in such circumstances as to expose him to a real risk that his rights under the Covenant will be violated in the jurisdiction to which that person is extradited, then that State party may itself be in violation of the Covenant.

2.2 I wonder, however, whether the Committee is right in concluding that, by extraditing Mr. Kindler, and thereby exposing him to the real risk of being deprived of his life, Canada did not violate its obligations under the Covenant. The question whether the author ran that risk under the Covenant in its concrete application to Canada must be examined, as the Committee sets out to do, in the light of the fact that Canada's decision to abolish the death penalty for all civil, as opposed to military, offences was given effect to in Canadian law.

2.3 The question which arises is what exactly are the obligations of Canada with regard to the right to life guaranteed under article 6 of the Covenant even if read alone and, perhaps and possibly, in the light of other relevant provisions of the Covenant, such as equality of treatment before the law under article 26 and the obligations deriving from article 5(2) which prevents restrictions or derogations from Covenant rights on the pretext that the Covenant recognizes them to a lesser extent. The latter feature of the Covenant would have, in my view, all its importance since the right to life is one to which Canada gives greater protection than might be thought to be required, on a minimal interpretation, under article 6 of the Covenant.

2.4 It would be useful to examine, in turn, the requirements of articles 6, 26 and 5(2) of the Covenant and their relevance to the facts before the Committee.

3.1 Article 6(1) of the Covenant proclaims that everyone has the inherent right to life. It requires that this right shall be protected by law. It also provides that no one shall be arbitrarily deprived of his life. Undoubtedly, in pursuance of article 2 of the Covenant, domestic law will normally provide that the unlawful violation of that right will give rise to penal sanctions as well as civil remedies. A State party may further give appropriate protection to that right by outlawing the deprivation of life by the State itself as a method of punishment where the law previously provided for such a method of punishment. Or, with the same end in view, the State party which has not abolished the death penalty is required to restrict its application to the extent permissible under the remaining paragraphs of article 6, in particular, paragraph 2. But, significantly, paragraph 6 has for object to prevent States from invoking the limitations in article 6 to delay or to prevent the abolition of capital punishment. And Canada has decided to abolish this form of punishment for civil as opposed to military, offences. It can be said that, in so far as civil offences are concerned, paragraph 2 is not applicable to Canada, because

Canada is not a State which, in the words of that paragraph, has not abolished the death penalty.

3.2 It seems to me, in any event, that the provisions of article 6(2) are in the nature of a derogation from the inherent right to life proclaimed in article 6(1) and must therefore be strictly construed. Those provisions cannot justifiably be resorted to in order to have an adverse impact on the level of respect for, and the protection of, that inherent right which Canada has undertaken under the Covenant "to respect and to ensure to all individuals within its territory and subject to its jurisdiction". In furtherance of this undertaking, Canada has enacted legislative measures to do so, going to the extent of abolishing the death penalty for civil offences. In relation to the matter in hand, three observations are called for.

3.3 First, the obligations of Canada under article 2 of the Covenant have effect with respect to "all individuals within its territory and subject to its jurisdiction", irrespective of the fact that Mr. Kindler is not a citizen of Canada. The obligations towards him are those that must avail to him in his quality as a human being on Canadian soil. Secondly, the very notion of "protection" requires prior preventive measures, particularly in the case of a deprivation of life. Once an individual is deprived of his life, it cannot be restored to him. These preventive measures necessarily include the prevention of any real risk of the deprivation of life. By extraditing Mr. Kindler without seeking assurances, as Canada was entitled to do under the Extradition Treaty, that the death sentence would not be applied to him, Canada put his life at real risk. Thirdly, it cannot be said that unequal standards are being expected of Canada as opposed to other States. In its very terms, some provisions of article 6 apply to States which do not have the death penalty and other provisions apply to those States which have not yet abolished that penalty. Besides, unequal standards may, unfortunately, be the result of reservations which States may make to particular articles of the Covenant though, I hasten to add, it is questionable whether all reservations may be held to be valid.

3.4 A further question arises under article 6(1), which requires that no one shall be arbitrarily deprived of his life. The question is whether the granting of the same and equal level of respect and protection is consistent with the attitude that, so long as the individual is within Canada's territory, that right will be fully respected and protected to that level, under Canadian law viewed in its total effect even though expressed in different enactments (penal law and extradition law), whereas Canada might be free to abrogate that level of respect and protection by the deliberate and coercive act of sending that individual away from its territory to another State where the fatal act runs the real risk of being perpetrated. Could this inconsistency be held to amount to a real risk of an "arbitrary" deprivation of life within the terms of article 6(1) in that unequal treatment is in effect meted out to different individuals within the same jurisdiction? A positive answer would seem to suggest itself as Canada, through its judicial arm, could not sentence an individual to death under Canadian law whereas Canada, through its executive arm, found it possible under its extradition law to extradite him to face the real risk of such a sentence.

3.5 For the above reasons, there was, in my view, a case before the Committee to find a violation by Canada of article 6 of the Covenant.

4. Consideration of the possible application of articles 26 and 5 of the Covenant would, in my view, lend further support to the case for a violation of article 6.

5. In the light of the considerations discussed in paragraph 3.4 above, it would seem that article 26 of the Covenant which guarantees equality before the law has been breached. Equality under this article, in my view, includes substantive equality under a State party's law viewed in its totality and its effect on the individual. Effectively, different and unequal treatment may be said to have been meted out to Mr. Kindler when compared with the treatment which an individual having committed the same offence would have received in Canada. It does not matter, for this purpose, whether Canada metes out this unequal treatment by reason of the particular arm of the State through which it acts, that is to say, through its judicial arm or through its executive arm. Article 26 regulates a State party's legislative, executive as well as judicial behaviour. That, in my view, is the prime principle, in questions of equality and non-discrimination under the Covenant, guaranteeing the application of the rule of law in a State party.

6. I have grave doubts as to whether, in deciding to extradite Mr. Kindler, Canada would have reached the same decision if it had properly directed itself on its obligations deriving from article 5(2), in conjunction with articles 2, 6 and 26, of the Covenant. It would appear that Canada rather considered, in effect, the question whether there were, or there were not, special circumstances justifying the application of the death sentence to Mr. Kindler, well realizing that, by virtue of Canadian law, the death sentence could not have been imposed in Canada itself on Mr. Kindler on conviction there for the kind of offence he had committed. Canada had exercised its sovereign decision to abolish the death penalty for civil, as distinct from military, offences, thereby ensuring greater respect for, and protection of the individual's inherent right to life. Article 5(2) would, even if article 6 of the Covenant were given a minimal interpretation, have prevented Canada from invoking that minimal interpretation to restrict or give lesser protection to that right by an executive act of extradition though, in principle, permissible under Canadian extradition law.

R. Lallah

[Done in English, French and Spanish, the English text being the original version.]

D. Individual opinion submitted by Mr. Fausto Pocar (dissenting)

While I agree with the decision of the Committee in so far as it refers to the consideration of the claim under article 7 of the Covenant, I am not able to agree with the findings of the Committee that in the present case there has been no violation of article 6 of the Covenant. The question whether the fact that Canada had abolished capital punishment except for certain military offences required its authorities to refuse extradition or request assurances from the United States that the death penalty would not be imposed against Mr. Kindler, must in my view receive an affirmative answer.

Regarding the death penalty, it has to be recalled that, although article 6 of the Covenant does not prescribe categorically the abolition of capital punishment, it imposes a set of obligations on States parties that have not yet abolished it. As the Committee has pointed out in its General Comment 6(16), "the article also refers generally to abolition in terms which strongly suggest that abolition is desirable." Furthermore, the wording of paragraphs 2 and 6 clearly indicates that article 6 tolerates - within certain limits and in view of a future abolition - the existence of capital punishment in States parties that have not yet abolished it, but may by no means be interpreted as implying for any State party an authorization to delay its abolition or, a fortiori, to enlarge its scope or to introduce or reintroduce it. Consequently, a State party that has abolished the death penalty is in my view under the legal obligation, according to article 6 of the Covenant, not to reintroduce it. This obligation must refer both to a direct reintroduction within the State's jurisdiction, and to an indirect one, as it is the case when the State's jurisdiction, and to an indirect one, as it is the case when the State acts - through extradition, expulsion or compulsory return - in such a way that an individual within its territory and subject to its jurisdiction may be exposed to capital punishment in another State. I therefore conclude that in the present case there has been a violation of article 6 of the Covenant.

F. Pocar

[Done in English, French and Spanish, the English text being the original version.]

E. Individual opinion submitted by Mrs. Christine Chanet (dissenting)

The questions posed to the Human Rights Committee by Mr. Kindler's communication are clearly set forth in paragraph 14.1 of the Committee's decision.

Paragraph 14.2 does not require any particular comment on my part.

On the other hand, when replying to the questions thus identified in paragraph 14.1, the Committee, in order to conclude in favour of a non-violation by Canada of its obligations under article 6 of the Covenant, was forced to undertake a joint analysis of paragraphs 1 and 2 of article 6 of the Covenant.

There is nothing to show that this is a correct interpretation of article 6. It must be possible to interpret every paragraph of an article of the Covenant separately, unless expressly stated otherwise in the text itself or deducible from its wording.

That is not so in the present case.

The fact that the Committee found it necessary to use both paragraphs in support of its argument clearly shows that each paragraph, taken separately, led to the opposite conclusion, namely, that a violation had occurred.

According to article 6, paragraph 1, no one shall be arbitrarily deprived of his life; this principle is absolute and admits of no exception.

Article 6, paragraph 2, begins with the words: "In countries which have not abolished the death penalty ...". This form of words requires a number of comments:

It is negative and refers not to countries in which the death penalty exists but to those in which it has not been abolished. Abolition is the rule, retention of the death penalty the exception.

Article 6, paragraph 2, refers only to countries in which the death penalty has not been abolished and thus rules out the application of the text to countries which have abolished the death penalty.

Lastly, the text imposes a series of obligations on the States in question. Consequently, by making a "joint" interpretation of the first two paragraphs of article 6 of the Covenant, the Committee has, in my view, committed three errors of law:

One error, in that it is applying to a country which has abolished the death penalty, Canada, a text exclusively reserved by the Covenant - and that in an express and unambiguous way - for non-abolitionist States.

The second error consists in regarding as an authorization to re-establish the death penalty in a country which has abolished it what is merely an implicit recognition of its existence. This is an extensive interpretation which runs counter to the proviso in paragraph 6 of article 6 that "nothing in this article shall be invoked ... to prevent the abolition of capital punishment". This extensive interpretation, which is restrictive of rights, also runs counter to the provision in article 5, paragraph 2, of the Covenant that "there shall be no

restriction upon or derogation from any of the fundamental human rights recognized or existing in any State party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent". Taken together, these texts prohibit a State from engaging in distributive application of the death penalty. There is nothing in the Covenant to force a State to abolish the death penalty but, if it has chosen to do so, the Covenant forbids it to re-establish it in an arbitrary way, even indirectly.

The third error of the Committee in the Kindler decision results from the first two. Assuming that Canada is implicitly authorized by article 6, paragraph 2, of the Covenant, to re-establish the death penalty, on the one hand, and to apply it in certain cases on the other, the Committee subjects Canada in paragraphs 14.3, 14.4 and 14.5, as if it were a non-abolitionist country, to a scrutiny of the obligations imposed on non-abolitionist States: penalty imposed only for the most serious crimes, judgement rendered by a competent court, etc.

This analysis shows that, according to the Committee, Canada, which had abolished the death penalty on its territory, has by extraditing Mr. Kindler to the United States re-established it by proxy in respect of a certain category of persons under its jurisdiction.

I agree with this analysis but, unlike the Committee, I do not think that this behaviour is authorized by the Covenant.

Moreover, having thus re-established the death penalty by proxy, Canada is limiting its application to a certain category of persons: those that are extraditable to the United States.

Canada acknowledges its intention of so practising in order that it may not become a haven for criminals from the United States. Its intention is apparent from its decision not to seek assurances that the death penalty would not be applied in the event of extradition to the United States, as it is empowered to do by its bilateral extradition treaty with that country.

Consequently, when extraditing persons in the position of Mr. Kindler, Canada is deliberately exposing them to the application of the death penalty in the requesting State.

In so doing, Canada's decision with regard to a person under its jurisdiction according to whether he is extraditable to the United States or not, constitutes a discrimination in violation of article 2, paragraph 1, and article 26 of the Covenant.

Such a decision affecting the right to life and placing that right, in the last analysis, in the hands of the Government which, for reasons of penal policy, decides whether or not to seek assurances that the death penalty will not be carried out, constitutes an arbitrary deprivation of the right to life forbidden by article 6, paragraph 1, of the Covenant and, consequently, a misreading by Canada of its obligations under this article of the Covenant.

Ch. Chanet

[Done in English, French and Spanish, the French text being the original version.]

F. Dissenting opinion by Mr. Francisco Jose Aguilar Urbina

I. Inability to join in the majority opinion

1. I requested the Secretariat to clarify various defects in the Draft in respect of which no explanation had been given despite the fact that I had already requested their elucidation in advance. I asked, inter alia, for explanations regarding the system followed in the State of Pennsylvania for sentencing a person. In paragraph 2.1 of the Draft it was stated that "the jury recommended the death sentence". From my first statement during the discussion, I commented that there could be three possibilities, and that whether I joined in the majority or opposed it depended on which procedure was applied. Those possibilities were:

(a) That the jury could pronounce only on the guilt of the accused and that it was left to the judge, as a matter of law, to impose the sentence;

(b) That the jury not only pronounced on the innocence or guilt of the accused but also recommended the penalty, with the judge, however, remaining completely free to impose the sentence in keeping with his assessment of the case in conformity with law (in the terms in which paragraph 2.1 was drafted, this would appear to be the procedure practised by the State of Pennsylvania);

(c) That the jury ruled the innocence or guilt of the accused and, at the same time, decided upon the sentence to be imposed, not by way of a recommendation but as a penalty which the judge would necessarily be obliged to declare, not being able to change it in any circumstance but simply serving as a mouthpiece for the jury.

Consequently, in so far as the crux of the matter was whether Canada, in granting Mr. Kindler's extradition, had exposed him, necessarily or foreseeably, to a violation of article 6 of the Covenant, I was unable to give an opinion until that point was clarified, orally and in writing. It was necessary for me to know for certain what conditions governed the imposition of the death penalty. However, the Secretariat explained that the author had informed the Committee that the recommendation of the jury was binding (and this is stated in paragraph 2.1 of the views), a/ [...] that the question had been addressed in the Canadian courts where it had been established that such was the system applied in Pennsylvania.

2. I also asked for explanations concerning the powers of the Canadian Minister of Justice under the Extradition Treaty between Canada and the United States of America, especially because it was not at all clear - in the Spanish version of the Draft which contained the text of article 6 of the Treaty - whether the requesting State (in this case, the United States of America) should not have officially provided assurances that the death penalty would not be applied. Moreover, I requested to be given the possibility of acquainting myself with the text of article 25 of the 1985 Extradition Act, to which reference was made in paragraph 2.3 of the Draft but which was not reproduced anywhere.

3. I also requested the Secretariat to clarify exactly of which offence the author of the communication had been found guilty, in so far as a number of

matters were not clear, especially when working with the Spanish version of the text:

(a) In paragraph 2.1 of the Draft it was stated that Joseph John Kindler had been "convicted ... of first degree murder and kidnapping". b/ Nevertheless, in other parts of the Draft, as well as in the Amendments, it was merely stated that Mr. Kindler had been convicted of committing a murder. The first aspect that remained unclear was the type of murder concerned, since there was confusion in the terms used which in practice made it impossible to know what sentence hung over the author of the communication. In some parts it was stated that it was first degree murder, in others murder or murder with aggravating circumstances; in one of the paragraphs of the Draft it was even stated that he had been convicted of having committed "a most serious crime". c/ Faced with such confusion, I considered that the Committee could not have taken a decision until the acts for which Mr. Kindler had been convicted had been made absolutely clear. Although it is not for the Human Rights Committee to express an opinion on the procedure followed in the trial of the author of the communication in a country which is not a party to the Optional Protocol and which has not abolished the death penalty, it is important to know whether the acts imputed to him constitute "most serious crimes" within the meaning of article 6, paragraph 2, of the Covenant.

(b) In this connection, I asked for clarification, in the first place, as to whether the murder of which the author of the communication was convicted was the result of the kidnapping, of which he was also convicted, or whether the two offences were separate. This latter possibility can be inferred from the different treatment that has been given to the two offences in the views, especially in so far as the "kidnapping" is mentioned only in paragraph 2.1. d/ I therefore asked to be informed whether the murder of which Mr. Kindler was convicted resulted from the kidnapping. In that connection, it should be borne in mind that basically there are three possibilities that can be imputed to the author of the communication as constituting murder - in the first two places, first degree murder - but which differ in seriousness for the purposes of the implementation of article 6, paragraph 2, of the Covenant:

(1) That Mr. Kindler may have committed a purpose-related murder, in other words, a murder in which the author, at the time of the killing, was intending to prepare, facilitate or commit the kidnapping. One of the aims which the murderer may seek to achieve, in this particular case, is to secure impunity for himself. The important point here is that the death of the victim appears, in the eyes of the murderer, to be a necessary - or simply convenient or favourable - means of perpetrating another offence or of avoiding punishment for committing that other offence;

(2) That Mr. Kindler may have committed a cause-related murder. The murder results from the fact that the intended purpose of the attempt to commit another offence was not achieved - in the case of the author of the communication, the kidnapping. Cause-related murder is motivated by failure, unlike purpose-related murder, which is prompted by an illicit hope;

(3) The third possibility that presents itself is that the death of the kidnapped person may not have been caused by Mr. Kindler but may have been the result of action taken to prevent the perpetrator from committing the

offence of kidnapping. Here the death results from the criminal actions of the author of the communication, although he himself did not commit the murder directly.

(c) The confusion increases when we see that in the views mention is made of "murder", of "murder with aggravating circumstances" and of "premeditated murder". The first point that would have to be noted is that, in legal terms, first degree murder is in itself the killing of a person in aggravating circumstances, so that to speak of "first degree murder with aggravating circumstances" (asesinato con circunstancias agravantes) would be pleonastic. It is quite clear that the murder committed by Mr. Kindler is one in which first degree factors were involved. However, on the one hand not all first degree murders constitute most serious crimes within the meaning of article 6.

(d) On the other hand, the Committee, when it states that Mr. Kindler committed a premeditated murder without indicating that he committed more than one murder, would rule out the possibility that he may have committed other types of first degree murder. I asked the Secretariat to inform me on the basis of what information it was affirmed that specifically premeditated murder had been committed. Premeditated murder is a specific kind of murder different from other types of murder, such as those mentioned in subparagraphs (1) and (2) above. It is a kind of murder involving "cold" reflection on the part of the murderer, who not only decides to commit the crime but, once he has resolved to do so, begins to give detailed consideration to how to carry it out. Thus there is, in the offence of premeditated murder, a dual reflection: in the first place the murderer decides to commit the act; in the second place, he reflects on the means that he intends to use to carry it out.

(e) If premeditated murder was involved, the other offences related to kidnapping would be eliminated. It would no longer be a matter of categorization connected with the perpetration of the other offence (purpose-related murder) or with frustration at not having been able to carry it out successfully (cause-related murder), but rather of an "unrelated" murder involving, as the ground for aggravation, cold reflection regarding the means that were used to carry it out.

(f) Consequently, if what was involved was a premeditated murder, mention should not have been made of the kidnapping. However, if on the contrary the case was one of related murder, either purpose-related or cause-related, connected with the kidnapping, then these are no grounds for speaking of premeditated murder or for imputing to the author the coldness in the choice of means or manner of carrying out the murder that is characteristic of premeditation.

4. I find it intolerable that most of the doubts which I raised with the Secretariat were at no time cleared up before the Committee took a majority decision. The only doubt that was resolved was that concerning the system of sentencing followed in the State of Pennsylvania, but in the form of information imparted by the author to the Committee and not as a reliable fact. e/

II. Decision to write a dissenting opinion on the merits of the communication

5. After having considered the unconditional handing-over of the author of the communication by the Government of Canada to the Government of the United States of America, I have arrived at the conclusion that Canada has violated the International Covenant on Civil and Political Rights.

III. Extradition and the protection afforded by the Covenant

6. In analysing the relationship between the Covenant and extradition, it is remiss - and even dangerous, as far as the full enjoyment of the rights set forth in the Covenant is concerned - to state that since "it is clear from the travaux préparatoires that it was not intended that article 13 of the Covenant, which provides specific rights relating to the expulsion of aliens lawfully in the territory of a State party, should detract from normal extradition arrangements", extradition would remain outside the scope of the Covenant. f/ In the first place, we have to note that extradition, even though in the broad sense it would amount to expulsion, in a narrow sense would be included within the procedures regulated by article 14 of the Covenant. Although the procedures for ordering the extradition of a person to the requesting State vary from country to country, they can roughly be grouped into three general categories: (1) a purely judicial procedure, (2) an exclusively administrative procedure, or (3) a mixed procedure involving action by the authorities of two branches of the State, the judiciary and the executive. This last procedure is the one followed in Canada. The important point, however, is that the authorities dealing with the extradition proceedings constitute, for this specific case at least, a "tribunal" that applies a procedure which must conform to the provisions of article 14 of the Covenant.

7. The fact that the drafters of the International Covenant on Civil and Political Rights did not include extradition in article 13 is quite logical, but on that account it cannot be affirmed that their intention was to leave extradition proceedings outside the protection afforded by the Covenant. The fact is, rather, that extradition does not fit in with the legal situation defined in article 13. The essential difference lies, in my opinion, in the fact that this rule refers exclusively to the expulsion of "an alien lawfully in the territory of a State party". g/ Extradition is a kind of "expulsion" that goes beyond what is contemplated in the rule. Firstly, extradition is a specific procedure, whereas the rule laid down in article 13 is of a general nature; however article 13 merely stipulates that expulsion must give rise to a decision in accordance with law, and even - in cases where there are compelling reasons of national security - it is permissible for the alien not to be heard by the competent authority or to have his case reviewed. Secondly, whereas expulsion constitutes a unilateral decision by a State, grounded on reasons that lie exclusively within the competence of that State - provided that they do not violate the State's international obligations, such as those under the Covenant - extradition constitutes an act based upon a request by another State. Thirdly, the rule in article 13 relates to aliens who are in the territory of a State party to the Covenant, whereas extradition may relate both to aliens and to nationals; indeed, on the basis of its discussions the Committee has considered the practice of expelling nationals (for example exile) in general (other than under extradition proceedings) to be contrary to article 12. h/ Fourthly, the rule in article 13 relates to persons who are lawfully in the territory of a country; in the case of extradition, the individuals against whom

the proceedings are initiated are not necessarily lawfully within the jurisdiction of a country; on the contrary - and especially if it is borne in mind that article 13 leaves the question of the lawfulness of the alien's presence to national law - in a great many instances persons who are subject to extradition proceedings have entered the territory of the requested State illegally, as in the case of the author of the communication.

8. Although extradition cannot be considered to be a kind of expulsion within the meaning of article 13 of the Covenant, this does not imply that it is excluded from the scope of the Covenant. Extradition must be strictly adapted in all cases to the rules laid down in the agreement. Thus the extradition proceedings must follow the rules of due process as required by article 14 and, furthermore, their consequences must not entail a violation of any other provision. Therefore, a State cannot allege that extradition is not covered by the Covenant in order to evade the responsibility that would devolve upon it for the possible absence of protection in a foreign jurisdiction.

IV. The extradition of Mr. Joseph Kindler to the United States of America

9. In this particular case, Canada extradited the author of the communication to the United States of America, where he had been found guilty of first degree murder. It will have to be seen - as the Committee stated in its decision on the admissibility of the communication - whether Canada, in granting Mr. Kindler's extradition, exposed him, necessarily or foreseeably, to a violation of article 6 of the Covenant.

10. The same State party argued that "the author cannot be considered a victim within the meaning of the Optional Protocol, since his allegations are derived from assumptions about possible future events, which may not materialize and which are dependent on the law and actions of the authorities of the United States". i/ Although it is impossible to foresee a future event, it must be understood that whether or not a person is a victim depends on whether that event is foreseeable or, in other words, on whether, according to common sense, it may happen, in the absence of exceptional events that prevent it from occurring - or necessary - in other words, it will inevitably occur, unless exceptional events prevent it from happening. An initial aspect that has to be elucidated is, then, the nature of the jury's decision under the Code of Criminal Procedure of the State of Pennsylvania. The fact that Mr. Kindler may (foreseeably) or must (necessarily) be sentenced to death depends on the judge's power to change the jury's "recommendation". Although the Secretariat merely indicated that the author of the communication had stated that the recommendation of the jury had to be complied with by the judge, documents in the possession of the Secretariat showed that it was more than a simple statement by Mr. Kindler. j/ Before the Supreme Court of Canada the author stated, without being refuted by the Canadian Executive or the contrary being established in any other way that "the recommendation is binding and the judge must impose the death sentence". k/ In view of this affirmation, we must then take it for granted that the author, necessarily and foreseeably, will be sentenced to death and that, consequently, he may be executed at any moment. In this connection, it is the law of Pennsylvania that obliges the judge to comply with the jury's order. Canada's contention that what is involved is an event that may not materialize because it depends on the law and actions of the authorities is groundless. In the case of the Code of Criminal Procedure under

which the court that sentenced Mr. Kindler operates, the imposition of the death penalty is definite, since the judge cannot change the jury's decision.

11. It is possible, in this connection, that the author may appeal against the jury's decision, in which case the foreseeability and necessity of the execution could be affected in such a way that the death sentence might not hang over Mr. Kindler. However, four questions must be borne in mind in order to be able to decide that the death sentence would not necessarily or foreseeably be imposed:

(a) Whether the author still has the possibility of appealing against the sentence of first instance, in which he was sentenced to death;

(b) In the event of his still having that possibility, whether - if he was found guilty of the first degree murder of which he was convicted - the court of second instance must comply with the decision reached by the jury of first instance or whether it can impose another sentence more beneficial for the protection of the life of the author of the communication;

(c) The fact that the prevailing trend in the United States of America is to bar appeals in cases involving the death sentence. The intention not to accept appeals in such cases has already been stated, at least in the case of the Supreme Court of Justice;

(d) The fact that, according to the available documentation, the imposition of the death sentence might become increasingly frequent in the State of Pennsylvania. Thus, whereas in the author's pleas before the Supreme Court of Canada in May 1990 it is stated that the death penalty has not been applied in that State for a long time - although a large number of persons are awaiting execution by electric chair - the State party, in defending the extradition before the Committee, indicates that "the method of execution in Pennsylvania is lethal injection, which is the method proposed by those who advocate euthanasia ...". l/ Such an affirmation, which is, moreover, unacceptable in so far as it appears to be a defence of the death penalty by a State which has abolished it for all offences except a few of a military nature, would appear to serve to conceal the fact that, in the jurisdiction to which Mr. Kindler has been extradited, attempts have been made to find more effective methods of execution, implying that executions have been resumed in the State of Pennsylvania.

Consequently, and in application of the principle of in dubio pro reo, it has to be assumed that the execution of the author of the communication is a foreseeable event which, furthermore, will necessarily take place unless exceptional events intervene. m/

12. However, in connection with the "exceptional circumstances" mentioned by the State party in the reply of the Government of Canada to the communication from Joseph John Kindler following the Human Rights Committee's decision on admissibility dated 2 April 1993 (hereinafter referred to as the Reply), n/ the majority opinion in the Committee was that events that would have affected the jury's decision when it convicted Mr. Kindler were involved. The Canadian authorities should, therefore, have made an assessment of the proceedings at the trial in the United States.

13. Nevertheless, I cannot agree with the Committee in its assessment of what those "exceptional circumstances" are. In the first place, the Government of Canada has not explained what they consist of; it only mentions that "evidence showing that a fugitive would face certain or foreseeable violations of the Covenant" o/ would constitute an example of exceptional circumstances. It can be seen how the State party itself agrees that exceptional circumstances have a connection with the consequences of the extradition. Accordingly, the erroneous perception which the majority of the members of the Committee have had has led it to believe that the exceptional circumstances refer to the trial and conviction of Mr. Kindler in Pennsylvania. Thus the majority states that "all the evidence submitted concerning Mr. Kindler's trial and conviction" had been reviewed p/ when it is certain that the jurisprudence of the Supreme Court of Canada has indicated that the judge who deals with the extradition may not weigh the evidence or give an opinion as to its credibility and that such functions are left to the jury or judge in the trial that determines whether an offence has been committed. q/

14. In the second place, the Committee observes, in its majority opinion, that the discretionary right to seek assurances "would normally be exercised where exceptional circumstances existed" and that "careful consideration was given to this possibility". r/ Nevertheless, here too the Committee has a wrong perception. Canada itself, in its Reply, refers to exceptional circumstances only in two paragraphs and in a very summary manner; it also states, with reference to them, that "there was no evidence presented by Kindler during the extradition process in Canada and there is no evidence in this communication to support the allegations that the use of the death penalty ... violates the Covenant". s/ This affirmation contains two elements which do not allow me to share the majority opinion:

(a) Firstly - and this relates to my contention in the previous paragraph - the exceptional circumstances are connected with the application of the death penalty and not with the proceedings at the trial and the sentencing;

(b) Secondly, there was no exhaustive examination of what the State considers to be exceptional circumstances, since Kindler submitted no evidence in that connection. According to what we are told by the State party, it was not the responsibility of the Canadian courts, the Minister of Justice or the Human Rights Committee to study ex officio the details of the trial and sentencing but rather of Mr. Kindler to present, before all the organs that had heard the case, evidence that the death penalty violated his rights, in which case there would be an exceptional circumstance. In so far as the author did not present such "evidence", the State party admits that it had not been possible to give careful attention to that possibility.

15. Nevertheless, the most important aspect of the exceptional circumstances is that related to the State party's affirmations that they refer to the application of the death penalty. I have pointed out on several occasions that exceptional circumstances have to be considered in relation to the possibility that the death penalty may be applied. I do not share the idea expressed by Canada concerning the relationship between those circumstances and the death penalty. In my view, the most important matter is the link between the application of the death penalty and the protection given to the lives of persons within the jurisdiction of the Canadian State. For them, the death penalty constitutes in itself a special circumstance. For that reason - and in

so far as the jury decided that the author of the communication must die - Canada had a duty to seek assurances that Joseph John Kindler would not be executed.

16. The fact that the death penalty constitutes a special circumstance derives from article 6 of the Extradition Treaty. Of all the provisions of the Treaty, only this one (relating to the extradition of persons who may be sentenced to death or who have already been so sentenced) makes it possible for one of the parties to seek from the other assurances that the individual whose extradition is requested will not be executed. This article stipulates that the death penalty is different from other sentences and must be viewed in a special way.

17. This provision also accepts that the States parties to the Extradition Treaty have values and traditions in regard to the death penalty which the requesting State must respect. Consequently, in order to guarantee respect for those values and traditions, both have provided, in article 6, for the inclusion of an exception rule in the Extradition Treaty. This fact is closely linked to the assertion which Canada made before the Human Rights Committee to the effect that the request for assurances was not pertinent in the case in question in so far as "The Government of Canada does not use extradition as a vehicle for imposing its concepts of criminal law policy on other States". t/ This contention seems to me to be unacceptable for three main reasons:

(a) It is stipulated in the Extradition Treaty that, where it is possible that the death penalty may be applied, the State requested to hand over the fugitive may seek assurances that he will not be executed and the requesting State has accepted a priori that it may be asked to apply a philosophy that does not accept death as a punishment for a crime under the ordinary law;

(b) The Extradition Treaty envisages that a person may not be extradited to the United States except for offences that are recognized as such in Canada. This would be the clearest case of the imposition of the penal concepts of one country on another, in so far as, even when there is reliable evidence of the guilt of an individual or he had already been sentenced in the United States, he could not be extradited since Canadian penal legislation would not consider his conduct to be an offence;

(c) Not to request assurances out of a desire to see the foreign law strictly applied amounts to imposing (in a self-inflicting manner) the law of one of the component parts of the United States of America (Pennsylvania) and its pro-death-penalty philosophy on the Canadian legal and social system.

18. It has been argued that Mr. Kindler was extradited without any assurances being sought because to have requested them would have prevented his handing-over to the United States authorities. This is another assertion that I cannot accept. On the one hand, since the State party to the Extradition Treaty has accepted in advance that assurances may be requested of it, it must be prepared to give them in any case. u/ On the other hand, Canada is affirming that the authorities of the United States of America are not willing in any circumstance to give those assurances and that they are even prepared to use extradition as a means of imposing their conception of penal law on Canada. I do not believe this to be the case.

19. The problem that arises with the extradition of Mr. Kindler to the United States without any assurances having been requested is that he has been deprived of the enjoyment of a right in conformity with the Covenant. Article 6, paragraph 2, of the Covenant, although it does not prohibit the death penalty, cannot be understood as an unrestricted authorization for it. In the first place, it has to be viewed in the light of paragraph 1, which declares that every human being has the inherent right to life. It is an unconditional right admitting of no exception. In the second place, it constitutes - for those States which have not abolished the death penalty - a limitation on its application, in so far as it may be imposed only for the most serious crimes. For those States which have abolished the death penalty it represents an insurmountable barrier. The spirit of the article is to eliminate the death penalty as a punishment, and the limitations which it imposes are of an absolute nature.

20. In this connection, when Mr. Kindler entered Canadian territory he already enjoyed an unrestricted right to life. By extraditing him without having requested assurances that he would not be executed, Canada has denied the protection which he enjoyed and has necessarily exposed him to be sentenced to death and foreseeably to being executed. Canada has therefore violated article 6 of the Covenant.

21. Further, Canada's misinterpretation of the rule in article 6, paragraph 2, of the International Covenant on Civil and Political Rights raises the question of whether it has also violated article 5, specifically paragraph 2 thereof. The Canadian Government has interpreted article 6, paragraph 2, as authorizing the death penalty. For that reason it has found that Mr. Kindler's extradition, even though he will necessarily be sentenced to death and will foreseeably be executed, would not be prohibited by the Covenant, since the latter would authorize the application of the death penalty. In making such a misinterpretation of the Covenant, the State party asserts that Mr. Kindler's extradition would not be contrary to the Covenant. In this connection, then, Canada has denied Mr. Joseph John Kindler a right which he enjoyed under its jurisdiction, adducing that the Covenant would give a lesser protection - in other words, that the International Covenant on Civil and Political Rights would recognize the right to life in a lesser degree than Canadian legislation. In so far as the misinterpretation of article 6, paragraph 2, has led Canada to consider that the Covenant recognizes the right to life in a lesser degree than its domestic legislation and has used that as a pretext to extradite the author to a jurisdiction where he will certainly be executed, Canada has also violated article 5, paragraph 2, of the Covenant.

22. I have to insist that Canada has misinterpreted article 6, paragraph 2, and that, when it abolished the death penalty, it became impossible for it to apply that penalty directly in its territory, except for the military offences for which it is still in force, or indirectly through the handing-over to another State of a person who runs the risk of being executed or who will be executed. Since it abolished the death penalty, Canada has to guarantee the right to life of all persons within its jurisdiction, without any limitation.

23. One final aspect to be dealt with is the way in which Mr. Kindler was extradited, no notice being taken of the request that the author should not be extradited prior to the Committee forwarding its final views on the communication to the State party y/ made by the Special Rapporteur on New

Communications under rule 86 of the rules of procedure of the Human Rights Committee. On ratifying the Optional Protocol, Canada undertook, with the other States parties, to comply with the procedures followed in connection therewith. In extraditing Mr. Kindler without taking into account the Special Rapporteur's request, Canada failed to display the good faith which ought to prevail among the parties to the Protocol and the Covenant.

24. Moreover, this fact gives rise to the possibility that there may also have been a violation of article 26 of the Covenant. Canada has given no explanation as to why the extradition was carried out so rapidly once it was known that the author had submitted a communication to the Committee. By its censurable action in failing to observe its obligations to the international community, the State party has prevented the enjoyment of the rights which the author ought to have had as a person under Canadian jurisdiction in relation to the Optional Protocol. In so far as the Optional Protocol forms part of the Canadian legal order, all persons under Canadian jurisdiction enjoy the right to submit communications to the Human Rights Committee so that it may hear their complaints. Since it appears that Mr. Kindler was extradited on account of his nationality w/ and in so far as he has been denied the possibility of enjoying its protection in accordance with the Optional Protocol, I find that the State party has also violated article 26 of the Covenant.

25. In conclusion, I find Canada to be in violation of article 5, paragraph 2, and articles 6 and 26 of the International Covenant on Civil and Political Rights. I agree with the majority opinion that there has been no violation of article 7 of the Covenant.

[Done in Spanish] San Rafael de Escazú, Costa Rica, 12 August 1993
Geneva, Switzerland, 25 October 1993 (Revision)

Notes

a/ Views, para. 2.1.

b/ Draft, para. 2.1 (emphasis added).

c/ Draft, para. 14.4.

d/ Views, para. 2.1.

e/ Views, para. 2.1.

f/ Views, para. 6.6 (emphasis added).

g/ International Covenant on Civil and Political Rights.

h/ In this connection, see the summary records of the Committee's recent discussions regarding Zaire and Burundi, in relation to the expulsion of nationals, and Venezuela in relation to the continuing existence, in criminal law, of the penalty of exile.

i/ Views, para. 4.2 (emphasis added).

j/ See above, para. 8.

k/ Appeal of Joseph John Kindler to the Supreme Court of Canada, para. 1, p. 1.

l/ Views, para. 9.7.

m/ In this connection, I understand by "exceptional events" (it should be noted that "exceptional events" differ somewhat from "exceptional circumstances") those events or acts which would prevent the execution of the author of the communication. They would normally be of a political nature, such as a pardon or the entry into force of legislation abolishing the death penalty. However, since these are decisions of a political nature, taken by persons who depend on the voters' will, and since the death penalty is favoured by a substantial majority of the population of the United States, the possibility that such exceptional events could occur is extremely remote.

n/ Reply, paras. 22 and 23.

o/ Reply, para. 23 (emphasis added).

p/ Views, para. 14.4.

q/ Supreme Court of Canada, United States of America vs. Shepard (1977), 2 S.C.R. 1067, pp. 1083-1087.

r/ Views, para. 14.5.

s/ Reply, para. 23 (emphasis added). In the same connection, the State refers to exceptional circumstances in para. 86 of the same document.

t/ Views, para. 8.6.

u/ I must point out that article 6 of the Extradition Treaty between Canada and the United States of America places no limit on requests for assurances. The exceptional circumstances which could provide a basis for requesting assurances form part of the Extradition Act.

v/ Rules of procedure of the Human Rights Committee.

w/ The various passages in the Reply which refer to the relations between Canada and the United States, the 4,800 kilometres of unguarded frontier between the two countries and the growing number of extradition applications by the United States to Canada should be taken into account. The State party has indicated that United States fugitives cannot be permitted to take the non-extradition of the author in the absence of assurances as an incentive to flee to Canada.

Annex XIII*

DECISIONS OF THE HUMAN RIGHTS COMMITTEE DECLARING COMMUNICATIONS INADMISSIBLE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 337/1988, E. E. v. Jamaica (decision of 23 October 1992, adopted at the forty-sixth session)

Submitted by: E. E. (name deleted)

Alleged victim: The author

State party: Jamaica

Date of communication: 1 November 1988

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 October 1992,

Adopts the following:

Decision on admissibility

1. The author of the communication (initial submission dated 1 November 1988) is E. E., a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations of his human rights by Jamaica. He is represented by counsel.

Facts as submitted

2.1 The author states that on 4 June 1987 he was detained and on 14 July 1987 charged with the murder of Ms. G. S. He was assigned a legal aid attorney, whom he saw only once for 30 minutes before the trial and who allegedly showed no interest in his case. At the conclusion of the trial in the Home Circuit Court, on 23 March 1988, the author was found guilty and sentenced to death.

2.2 The author appealed to the Jamaican Court of Appeal on 29 March 1988. Although the date for the hearing of the appeal was set for 26 September 1988, the author states that he was only informed of this the day after the appeal had been heard. On 10 October 1988, he learned that his appeal had been dismissed. He states that the attorney who represented him in the Court of Appeal told him that his case had been poorly handled at the trial stage and that there were no grounds for appeal.

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* Made public by a decision of the Human Rights Committee.

2.3 The author concedes that he has not yet exhausted all domestic remedies available to him. He contends that he cannot afford to pay a lawyer to file a petition for special leave to appeal to the Judicial Committee of the Privy Council.

Complaint

3. Although the author does not invoke any article of the International Covenant on Civil and Political Rights, it appears from his submission that he claims to be a victim of a violation by Jamaica of article 14 of the Covenant.

State party's observations and author's comments

4.1 The State party argues that the author's communication is inadmissible on the ground of failure to exhaust domestic remedies as required by article 5, paragraph 2, of the Optional Protocol, since the author's case has not been adjudicated upon by the Judicial Committee of the Privy Council.

4.2 The State party encloses a copy of the written judgement by the Court of Appeal, from which it transpires that the author was convicted on the evidence of two eyewitnesses. The witnesses had lived on the same premises with the author, and had known him for several years. Although the attack took place at night, a lamp in an adjoining room apparently provided enough light to recognize the author.

4.3 From the Court's judgement it further transpires that the author's counsel conceded that he had no valid complaint either in respect of the evidence or the directions by the judge to the jury.

5.1 In his reply to the State party's observations, the author reiterates that he does not have the financial means to seek the legal assistance of a lawyer to represent him before the Privy Council. Furthermore, he states that the procedure before the Judicial Committee would take an unreasonably long time.

5.2 The author further reiterates his innocence, and states that the evidence presented against him during the trial has not been corroborated. He contends that he was convicted so easily owing to his young age and inexperience. He further states that some of the evidence submitted by him during the trial was not included in the Court documents. Further information was received from counsel, on 13 July 1992, including a copy of the trial transcript.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee considers that the author's allegations, which relate primarily to his legal representation during the trial and to the hearing before the Court of Appeal, have not been substantiated, for purposes of admissibility. In this connection the Committee notes that the information before it does not disclose that the author requested and the Court actually denied him adequate time for the preparation of his defence. It further appears that the author's

lawyer did cross-examine witnesses, who appeared on behalf of the prosecution, that the author filed grounds for appeal and that counsel was present on behalf of the author at the hearing before the Court of Appeal. Accordingly, the Committee finds that the author has failed to advance a claim under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party, the author and his counsel.

[Done in English, French, Russian and Spanish, the English text being the original version.]

B. Communication No. 370/1989, G. H. v. Jamaica (decision of 23 October 1992, adopted at the forty-sixth session)

Submitted by: G. H. (name deleted)

Alleged victim: The author

State party: Jamaica

Date of communication: 30 June 1989 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 October 1992,

Adopts the following:

Decision on admissibility

1. The author of the communication is G. H., a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 The author was arrested in August 1982 and charged with the murder, on 5 August 1982, of one C. S. He was tried jointly with his brother in the St. James Circuit Court, Montego Bay, and convicted and sentenced to death on 3 February 1984; his brother, a minor at the time of the offence, was sentenced to life imprisonment. The Court of Appeal of Jamaica dismissed the author's appeal on 10 April 1987. A subsequent petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 16 March 1989.

2.2 C. S. was shot dead with two or three bullets fired from a 0.38 calibre weapon in the evening of 5 August 1982 and found near the Camrose main road. The prosecution contended that the author, his brother, one D. S. and another individual had been walking along that road on the evening in question. D. S. left the others temporarily and, after approximately five to seven minutes, heard two explosions. A few minutes afterwards, the author and his brother caught up with him; they told him that they, too, had heard the explosions but that they ignored what had caused them. G. H. testified that he had been walking with D. S. along the main road all along and that, when hearing the explosions, they had all run away.

2.3 During the trial, several witnesses testified that they had seen the author and his brother on the main road in the evening of 5 August. One W. B. testified that he had seen G. H. standing by the body, adding that the author had shown him a 0.38 calibre gun with live cartridges on 2 August 1982. V. B., the sister of W. B., testified that the author had been engaged in a dispute with the deceased on 1 August 1982, and that the deceased had attacked the author with a machete on that occasion.

2.4 The author claims that the B. family had every reason to exaggerate or to commit perjury in court, because of a long-standing feud with his family. He notes that W. B. had omitted any mention of the incident of 2 August 1982 in his witness statement and initial written deposition, and that the judge himself called the evidence of V. B. "confused".

2.5 The author further points out that there was severe conflict over important questions of timing. Thus, D. S. and another witness testified that the events occurred shortly after 7:15 p.m.; W. B., who did not hear any explosions, allegedly saw the author by the body just after 8:30 p.m., with several people following him. There also was no evidence that the author had been carrying a gun on the evening in question. The principal issue in the case therefore was one of reliability of the evidence.

Complaint

3.1 The author complains that he did not have a fair trial, because the trial judge misdirected it on the issue of circumstantial evidence, in that he failed to warn the jurors that circumstantial evidence should always be construed narrowly and rigorously, and in that he suggested that circumstantial evidence was "free from the blemishes" of evidence by witnesses who are either mistaken or influenced by grudge or spite. In the author's opinion, the Court of Appeal was equally wrong in holding that the trial judge properly directed the jury on the issue of circumstantial evidence.

3.2 The author further submits that the judge misdirected the jury on the law of aiding and abetting, since he put his directions in such a way that the jury could have been left with the erroneous impression that if the author had been present and watched the shooting, without any intent of encouraging it, he was guilty of murder. In this context, it is noted that the judge told the jury that "the mere presence of those watching the spectacle, if unexplained ... is some evidence of encouragement to those engaged in the combat or the attack".

3.3 Finally, it is claimed that the judge unfairly pressured the jury to return an early verdict: thus, he only began his summing-up in mid-afternoon, at 3:49 p.m., and sent the jury to the verdict room at 6:38 p.m., in the hope that the trial could end the same day.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 In as far as the author's claims under article 14 are concerned, the Committee observes that the author's allegations relate primarily to the conduct of the trial by the judge, the evaluation of evidence by the court, and the judge's instructions to the jury. It recalls that it is generally for the appellate courts of States parties to the Covenant to evaluate the facts and evidence in a particular case. Similarly, it is for the appellate courts and not for the Committee to review specific instructions to the jury by the judge, unless it is clear that the instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of

impartiality. The author's allegations do not show that the judge's instructions or the conduct of the trial suffered from such defects. In this respect, therefore, the author's claims do not come within the competence of the Committee. Accordingly, this part of the communication is inadmissible under article 3 of the Optional Protocol.

4.3 In respect of the author's claims under articles 6 and 7, the Committee finds that they have not been substantiated, for purposes of admissibility; in this respect, accordingly, the author has failed to advance a claim under the Covenant, within the meaning of article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this communication shall be transmitted to the State party, to the author and to his counsel.

[Done in English, French, Russian and Spanish, the English text being the original version.]

C. Communication No. 380/1989, R. L. M. v. Trinidad and Tobago (decision of 16 July 1993, adopted at the forty-eighth session)

Submitted by: R. L. M. (name deleted)

Alleged victim: The author

State party: Trinidad and Tobago

Date of communication: 17 June 1989 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication is R. L. M., an attorney in Trinidad and Tobago, residing in San Fernando, Trinidad. He claims to be a victim of violations by Trinidad and Tobago of articles 2, paragraph 3, and 17 of the International Covenant on Civil and Political Rights.

Facts as submitted

2.1 The author contends that he has been the target of "unfair and unacceptable" behaviour and animosity on the part of a judge, L. D., sitting on the Port-of-Spain Assizes Court. In several criminal cases, including capital cases, which were presided over by the said judge and in which the author represented the accused, this judge allegedly made unjustified remarks which called into question the author's professional ethics. Thus, in a murder trial before the Port-of-Spain Assizes Court in July 1987, Judge L. D. criticized the author for having intimated to a senior police officer, during cross-examination, that he was lying and for having accused the prosecution of concocting and fabricating evidence. On the other hand, the judge saw no reason for similarly criticizing the prosecutor, who had accused the author of dishonesty on the same occasion.

2.2 The author lists four other criminal cases handled by Judge L. D., in which he is said also to have made "baseless critical or derogatory remarks" about the author's professional conduct. Thus, in one criminal case, the judge made the following remarks:

> "I want to say a few words on the duty of attorneys for the defendants. They do not defend a case simply for the sake of a defence or simply on the instructions of their clients ... Without being critical of the conduct of the attorney in this case, attorneys should be firm in advising their clients when there is no chance of success."

The author contends that the judge is nurturing a "personal venom or vendetta" against him and considers his behaviour to be unfair and unacceptable.

2.3 As to the requirement of exhaustion of domestic remedies, the author indicates that sections 137 and 138 of the Trinidadian Constitution regulate whatever disciplinary action may be taken against a judge or judicial officer. He has addressed a request for disciplinary action against the judge to the Chief Justice of Trinidad, to the Prime Minister and the President of Trinidad, without success.

2.4 The author contends that any action in respect of the judge's conduct is further precluded by section 129, paragraph 3, of the Trinidadian Constitution, which stipulates that the question of whether a Service Commission has properly performed any function vested in it by the Constitution may not be inquired into by a court. This provision has been interpreted by the High Court and the Court of Appeal of Trinidad and Tobago as precluding them from inquiring into the action or non-action of, for example, the Judicial and Legal Services Commission. The complaint mechanism set up by the latter has, in the author's opinion, become "nugatory in that it has not even acknowledged [my] complaint". Mandamus and other avenues of judicial review are said to be similarly unavailable.

Complaint

3. The author contends that the comments of Judge L. D. about him constitute an unlawful attack on his honour and reputation, for which no remedy is available, in violation of articles 2, paragraph 3, and 17 of the Covenant.

State party's information and observations

4.1 The State party contends that the communication is inadmissible both as incompatible with the provisions of the Covenant, in particular article 17, and as an abuse of the right of submission, pursuant to article 3 of the Optional Protocol.

4.2 In this context, the State party observes that the comments alleged to have been made by Judge L. D. do not reveal particular animosity towards the author but merely remind him of his professional duties vis-à-vis the Court and his clients. It further notes that comments made by a judge in his judicial capacity "are absolutely privileged", and that no action may be filed in the courts against such comments. Accordingly, they cannot, in the State party's opinion, be deemed "unlawful" within the meaning of article 17 of the Covenant.

4.3 The State party explains the rationale for the privileged nature of remarks made by judges in their judicial capacity:

> "In the public interest it is desirable that persons in certain positions, such as judges ..., should be able to express themselves with complete freedom and, to secure their independence, absolute privilege is given to their acts and words" (quote from Halsbury's Laws of England, 4th ed., vol. 28, para. 96).

This rule applies even if the acts or remarks attributed to a judge are malicious, a qualification which according to the State party does not apply to the present case.

Issues and proceedings before the Committee

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has examined the information submitted by the parties, including the author's petition to the Chief Justice of Trinidad and Tobago. It observes that the author has not shown, for purposes of admissibility, that the remarks attributed to Judge L. D. constituted an unlawful attack on his honour and reputation. Accordingly, the author has no claim under the Covenant, within the meaning of article 2 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this communication shall be communicated to the State party and to the author of the communication.

[Done in English, French and Spanish, the English text being the original version.]

D. Communication No. 404/1990, N. P. v. Jamaica (decision of 5 April 1993, adopted at the forty-seventh session)

Submitted by: N. P. (name deleted)

Alleged victim: The author

State party: Jamaica

Date of communication: 17 April 1990 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 5 April 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication is N. P., a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be the victim of violations by Jamaica of articles 6; 7; 10, paragraph 1; and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 On 13 February 1987, the author and two co-defendants were tried before the Home Circuit Court in Kingston for the murder, on 11 November 1985, of one K. W. They were found guilty as charged and sentenced to death. The author's appeal was dismissed by the Jamaican Court of Appeal on 11 July 1988; his subsequent petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 5 April 1990.

2.2 The case for the prosecution was that, in the evening of 10 November 1985, K. W. and his family were at their home in the community of Edgewater. Shortly after 12.30 a.m., Mrs. W. woke up and discovered that her husband had been tied up; next to him stood a man with a gun. On her side of the bed stood another man, whom she later identified as the author, who ordered her to put her hand behind her back and then tied them up. The men asked for money; K. W. denied that there was any in the house, upon which he was hit several times with a gun. The robbers then woke up the couple's two children, brought them into their parents' bedroom and threatened to shoot them if the whereabouts of the money was not disclosed. Subsequently, one of the men, later identified as P. L., took an electric iron, plugged it into a socket and used it to burn K. W. over his back. When K. W. lashed out at him and knocked him against the wall, P. L. removed his gun from his waistband and shot K. W. in the abdomen, causing his instantaneous death.

2.3 All three robbers wore handkerchief masks which concealed at least the lower portions of their faces. The prosecution contended that, on several occasions, these masks were removed; this was corroborated by the evidence of

the deceased's two children. There were varying accounts as to the source or to the quality of the lighting in the bedroom. It was contended that the principal source of light came from an adjoining bathroom, although at some stage it was argued that the bedside light had also been turned on. In addition to the identification evidence, the prosecution relied upon fingerprints of all three men that were found at the locus in quo.

Complaint

3.1 The author denies that he ever visited the home of the deceased and asserts that he was apprehended one morning in November 1985, while travelling in a minibus to visit relatives. He was taken to the central police station where he was allegedly beaten in order to force him to sign a self-incriminating statement, which he refused. He claims that his treatment at the police station was in violation of article 7 of the Covenant. The author further contends that he was held for several days in a cell at said station before he was placed on an identification parade. He challenges the conduct of the identification parade on the ground that the police had previously taken away his identification card, which carried his photograph.

3.2 The author claims that he was denied a fair trial, in violation of article 14 of the Covenant. He complains that the identification evidence against him was weak and open to serious criticism. Furthermore, the trial judge is said to have misdirected the jury on the burden and standard of proof in that he directed it that guilt could be established if the jurors were less than "100 per cent sure, because that is not possible". It is further alleged that the judge misdirected the jury on the question of "common design" or "joint enterprise" and, in particular, failed to direct the jurors that they should not convict on the basis of common design unless they were convinced that the author contemplated or foresaw not only the likelihood of violence but, also, of violence causing death or grievous bodily harm.

State party's information and observations

4. The State party submits that the communication is inadmissible on the ground of non-exhaustion of domestic remedies. It contends that the author may still apply to the Supreme (Constitutional) Court of Jamaica to seek redress for the alleged breaches, pursuant to Sections 14, 15, 17, 20 and 25 of the Jamaican Constitution. A right of appeal from the decision of the Supreme Court lies to the Court of Appeal and subsequently to the Judicial Committee of the Privy Council.

Issues and proceedings before the Committee

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 As regards the author's claim under articles 6, 7, and 10, the Committee considers that the author has failed to substantiate his allegations, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

5.3 The Committee observes that the author's remaining allegations concern claims about irregularities in the court proceedings, in that the judge instructed the jury improperly on the issues of identification and common design or joint enterprise. It reiterates that, although article 14 guarantees the right to a fair trial, it is not in principle for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. In this context, the Committee has examined the judge's instructions to the jury and finds in them no arbitrariness, denial of justice, or a violation of the judge's obligation of impartiality, particularly as regards the question of common design or joint enterprise. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the author and to his counsel.

[Done in English, French and Spanish, the English text being the original version.]

E. Communication No. 420/1990, G. T. v. Canada (decision of 23 October 1992, adopted at the forty-sixth session)

Submitted by: G. T. (name deleted)

Alleged victim: The author

State party: Canada

Date of communication: 22 March 1990 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 October 1992,

Adopts the following:

Decision on admissibility

1. The author of the communication is G. T., a Canadian citizen residing in Toronto, Canada. He claims to be the victim of a violation of his human rights by Canada. No reference is made to the Covenant.

Facts as submitted

2.1 The author states that he was employed for eleven years as a physical education teacher by the Board of Education for the City of North York (hereinafter North York Board). Early in 1986, pursuant to the provisions of a collective agreement between the North York Board and the Ontario Secondary School Teachers' Federation District 13 (hereinafter the Federation), the author was identified as being surplus to the Board's requirements. Accordingly, on 20 August 1986, the North York Board decided to transfer him to the Metropolitan Separate School Board, the Roman Catholic board with jurisdiction over the same geographical area as the North York Board, pursuant to Section 136-1 of the Education Amendment Act of 1986, commonly referred to as "Bill 30".

2.2 Section 136-1(10) of the Act provides that:

> "If a designated person objects to the transfer of employment to the Roman Catholic school board for reasons of conscience, he or she may so advise the public board and, unless it is of the opinion that the objection is not made in good faith, the public board shall designate another person in place of the person making the objection."

2.3 Some teachers, who were designated in July and August 1986 by the North York Board pursuant to Section 136-1(1), objected to their transfers on grounds of conscience and other teachers were nominated in their place; those who did not object on grounds of conscience were transferred to the Metropolitan Separate School Board with effect from 1 September 1986. The author was initially advised by the North York Board that he could object on grounds of conscience until 5 September 1986. Subsequently, this deadline was extended until 12 September 1986.

2.4 The Roman Catholic school board requested the author not to report to work before 12 September 1986, since no vacant post of physical education was said to be available. The author therefore submits that he had no experience with the Roman Catholic school system prior to the deadline set by the North York Board for objections on the grounds of conscience.

2.5 On 12 September 1986 the author was assigned to the Senator O'Connor Secondary School. However, he was not given a position in accordance with his qualifications and experience. In December 1986 he was rejected as a possible candidate for the position of "head of physical education" at a secondary school under the Metropolitan Separate School Board, on the ground that he had no experience in the Catholic education system. In September 1987, the author was re-assigned to the Father Brebeuf Secondary School, to act as assistant to a physical education teacher.

2.6 During the first two weeks of his teaching at the Father Brebeuf School, the author realized that it was no longer possible for him to teach in an environment functioning on the basis of rules and beliefs incompatible with his own personal convictions. Moreover, he had by then learned that two other teachers, who had also objected to their transfers on grounds of conscience after the transfer had become effective, had been allowed to return to the public school system. He therefore ceased to report to work. On 14 September 1987, he filed an objection with the North York Board pursuant to Section 136-1(10) of Bill 30.

2.7 On 2 November 1987, the Director of the North York Board informed the author that his objection had been rejected. This prompted the Teachers' Federation to file a complaint against the Board's decision on behalf of the author. The dispute was then submitted to an Arbitration Board set up pursuant to Section 136m(1) of Bill 30. On 17 August 1988, the Arbitration Board dismissed the complaint on the ground that the author, under Bill 30, had no statutory rights to return to the public system, since Section 136-1(10) of the Act could not be interpreted as guaranteeing such a right. It rejected the author's argument that his rights under the Canadian Charter of Rights and Freedoms, in particular his right to non-discrimination and freedom of conscience, thought, belief and religion, had been violated.

2.8 Subsequently, the Federation, on the author's behalf, applied for review of the Arbitration Board's decision to the Divisional Court of Ontario, which dismissed the application on 21 August 1989.

Complaint

3.1 The author claims that he did not enjoy equal opportunity with respect to the Roman Catholic teachers, and refers in this connection to the fact that he was not offered a position suitable to his qualifications and experience. He also alleges that he was not allowed to discuss certain health issues, such as contraception, abortion and AIDS, with the students, as he did not share the Roman Catholic beliefs.

3.2 The author submits that he only started to have conscientious objections after he had experienced working in the Roman Catholic school system for a while. He stresses that he entered the Roman Catholic education with an open mind and without prejudices.

3.3 The author further contends that he was discriminated against by the North York Board, as two teachers who had been transferred to the Metropolitan Separate School Board were subsequently permitted to return to the public school system. He indicates that one of those teachers notified the North York Board of her objection on 11 September 1986, while the other did so on 4 November 1986. In support of his argument, the author quotes from a dissenting opinion submitted by one of the arbitrators on the Board of Arbitration, according to which Section 136-1(10) of Bill 30 does not envisage time-limits for filing objections on grounds of conscience; nor can, according to this opinion, a limit be inferred from other sections of the Act.

3.4 Although the author does not invoke any article of the International Covenant on Civil and Political Rights, it appears from his submission that he claims to be a victim of a violation of articles 18 and 26 of the Covenant.

State party's observations and the author's comments thereon

4.1 The State party, by submission dated 5 November 1991, argues that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. It contends that, by failing to seek leave to appeal from the Divisional Court's decision to the Ontario Court of Appeal, the author precluded a definitive judicial assessment of his claim by the courts in Canada. The State party also states that legal aid would have been available to enable the author to seek leave to appeal.

4.2 The State Party further argues that the author could have pursued remedies available under the Ontario Human Rights Code, which in section 4 expressly prohibits discrimination in employment. It submits that both Ontario case law and the Code clearly indicate that legislation that provides for arbitration of disputes does not eliminate the jurisdiction of the Ontario Human Rights Commission, or subsequently the Board of Inquiry. It states that the procedure is free of charge for the complainant and that, in the past, orders requiring reinstatement in employment have been issued. It indicates that decisions by the Board of Inquiry may be appealed to the Divisional Court of Ontario.

4.3 The State party further argues that the author has failed to establish a prima facie case of a violation of his rights under the Covenant. In this context, the State party observes that the author has not invoked any of the articles of the Covenant. It argues that, if the author means to allege a violation of article 26 of the Covenant, he has not provided any evidence of an unreasonable distinction which could amount to discrimination.

4.4 In this connection, the State party submits that Section 136-1(21) of the Education Act protects designated teachers in a position comparable to the author's against discrimination in employment on the basis of religion. It contends that the author did not exercise his rights to object to his transfer on grounds of conscience at the relevant time provided by law. The State party submits that nothing in the Optional Protocol shields a person from the consequences of a failure to use processes designed to protect freedom of religion and conscience in a reorganization of employment among different school systems. It finally argues that there is no evidence that the author was in any way required to adopt or express Roman Catholic beliefs or opinions.

5.1 In his comments on the State party's observations, dated 3 September 1991, the author stresses that he could not in good faith have filed conscientious objections against his transfer before 12 September 1986, the time-limit set by the North York School Board, as he had never experienced working in a Roman Catholic school system. Only in September 1987 he became aware of the fact that two other designated teachers had been allowed to return to the public school system after 12 September 1986; he therefore argues that he could not have submitted his request at an earlier date.

5.2 As regards the State party's claim that he has not presented a prima facie case of discrimination, the author refers to the refusal of the Metropolitan Separate School Board to include him on the list of potential candidates for the position of "head of physical education" at a secondary school under its jurisdiction (see paragraph 2.5 of the present decision).

5.3 With regard to the State party's contention that he failed to exhaust domestic remedies, the author states that, following the Divisional Court's decision, the Ontario Secondary School Teachers' Federation, who had been providing him with a lawyer, decided to withdraw its support. The author claims that, since he could not afford to hire a lawyer, he therefore could not pursue the appeal. He further submits that, because of lapse of time, any other remedy available would no longer be effective.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the State party's objection that the author has not identified the articles of the Covenant he claims have been violated, the Committee affirms its jurisprudence that it is not necessary for authors to specifically invoke articles of the Covenant; a/ under the Optional Protocol procedure authors are, however, required to submit the relevant facts and to substantiate their allegations.

6.3 The Committee observes that the author has not sought judicial review of the decision of the Divisional Court to the Court of Appeal of Ontario, and that he appears to have made no effort to apply for legal aid under the Ontario Legal Aid Act. Moreover, the author has not availed himself of procedures under the Ontario Human Rights Code, which he could have done without incurring expenses. The State party has argued and the author has not contested that a petition before the Ontario Human Rights Commission, or subsequently the Board of Inquiry, could have resulted in his reinstatement in the public school system.

6.4 In the light of the above, the Committee concludes that the author has not met the requirement of exhaustion of domestic remedies set forth in article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to t author.

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ See the Committee's decision in communication No. 273/1988 (D. B. v. the Netherlands), para. 6.3.

F. Communication No. 427/1990, H. H. v. Austria (decision of 22 October 1992, adopted at the forty-sixth session)

Submitted by: H. H. (name deleted)

Alleged victim: The author

State party: Austria

Date of communication: 20 September 1990 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 October 1992,

Adopts the following:

Decision on admissibility

1. The author of the communication (dated 20 September 1990) is H. H., an Austrian citizen residing in Vienna. He claims to be the victim of violations by Austria of articles 7, 17, 23 and 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Austria on 10 March 1988.

Facts as submitted

2.1 The author is a professor of biomechanics at the University of Vienna. Since 1986, he has been endeavouring to build a house in the community of E. in the District of Lower Austria (Niederösterreich); allegedly, the mayor of E. has used his administrative powers to frustrate the author's efforts to obtain construction authorizations.

2.2 Since 1986, the mayor of E. has allegedly sent several summons, as notices and decisions to the author, many of them based on the building regulations of Lower Austria (Niederösterreichische Bauordnung), with the sole purpose of harassing him. These summons and decisions were later found to be unlawful by the district government of Lower Austria, as well as by the courts. The author submits that he had to invest considerable time and money to obtain the necessary legal advice for the proceedings destined to fend off the attacks of the mayor.

2.3 In the chronology of his case, the author singles out the following events. On 14 March 1988, the mayor of E. issued a notice ordering the author to pay a substantial sum of money (Aufschliessungsbeitrag) for the authorization of the joinder of two building sites. Three legal advisors of the district government allegedly explained to the mayor by letter that his notice was lacking a proper legal basis. Ignoring their advice, the mayor initiated proceedings by which a significant part of the author's salary was seized and transferred to a community account.

2.4 On 6 July 1990, the Supreme Administrative Tribunal of Austria (Verwaltungsgerichtshof) found in the author's favour and confirmed that the actions of the mayor lacked a legal basis. The money seized from the author had to be repaid.

2.5 The author states that the "unbearable situation" caused by the mayor's actions against him means that the normal pursuit of his professional duties and participation in academic symposia and publication activities have been reduced alarmingly. In this context, he explains that since 1986, he has spent over 600 hours on drafting "countless appeals and letters" in defence of his rights; this has amounted to financial losses of approximately $US 90,000, for which he claims he deserves compensation.

2.6 The author further states that he has requested the president of the provincial government of Lower Austria as well as the Vice Chancellor of the Republic to investigate the conduct of the mayor of E. However, they informed him that they had no competence to carry out an investigation into the matter, on account of the autonomy of municipalities (Gemeindeautonomie) in Austria. With these steps, the author claims to have exhausted available domestic remedies.

Complaint

3.1 According to the author, the proceedings initiated by the mayor of E. have caused "irreparable harm" to his reputation at the University of Vienna, as many university departments, as well as the dean of his faculty, the rector of the university and some colleagues, were involved in the "degrading procedures" against him or became aware of them. In the author's opinion, the "unlawful" attacks of the mayor constitute violations of article 17, paragraph 1, of the Covenant.

3.2 The author further submits that the "permanent harassment and psychological terror" exercised by the mayor since 1986 have had a profoundly detrimental effect on his and his family's health, security and well-being, a situation said to constitute a violation of articles 7 and 23, paragraph 1, of the Covenant.

State party's observations and the author's comments thereon

4. In its submission, dated 24 September 1991, the State party argues that the communication is inadmissible. According to the State party all unlawful actions by the mayor have been remedied; the author has failed to substantiate his allegations that he is still a victim of a violation of articles 7, 17, 23, and 26 of the Covenant. The State party further contends that the author has failed to exhaust criminal and constitutional remedies.

5.1 In his comments, the author disputes the State party's contention that there are still criminal and constitutional remedies available. He states that on 29 August 1988 and 21 September 1990, he filed criminal charges against the mayor for misuse of official powers; on both occasions the public prosecutor declined to initiate criminal proceedings against the mayor. He forwards copies of the notices of dismissal of his complaints. He further submits that he filed a constitutional complaint with the Government of Lower Austria on 28 May 1990, alleging to be a victim of a violation of the principle of equality. This complaint was dismissed on 22 March 1991.

5.2 The author argues that he still suffers from the consequences of the unlawful acts intentionally committed by the mayor, which, according to the author, amounted to inhuman and degrading treatment. He further contends that the violations are not sufficiently remedied by the quashing of the mayor's decisions, since he did not receive any compensation for the harm done to his reputation and for the time and money he spent on appealing the decisions.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, pursuant to rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee considers that the author has not substantiated, for purposes of admissibility, his claim that he is a victim of violations by the State party of articles 7, 17, 23 and 26 of the Covenant. The Committee further notes that the author's allegations concern decisions taken by the mayor of E., which have subsequently been quashed by higher authorities or the courts. The Committee, accordingly, concludes that the author has failed to advance a claim under article 2 of the Optional Protocol.

6.3 In so far as the author may be understood as claiming compensation for the harm done to his reputation and for the time and money he spent on appealing the mayor's decisions, the Committee notes that the author has not initiated civil proceedings against those persons or entities whom he claims were responsible. The Committee therefore concludes that, in this respect, the author has failed to exhaust domestic remedies.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author of the communication.

[Done in English, French, Russian and Spanish, the English text being the original version.]

G. Communication No. 429/1990, E. W. et al. v. the Netherlands (decision of 8 April 1993, adopted at the forty-seventh session)

Submitted by: E. W. et al. (name deleted)

Alleged victims: The authors

State party: The Netherlands

Date of communication: 19 November 1990 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 April 1993,

Adopts the following:

Decision on admissibility

1. The authors of the communication are 6,588 citizens of the Netherlands who claim that their rights under article 6 of the International Covenant on Civil and Political Rights have been violated by the Netherlands, because the Netherlands Government agreed to the deployment of cruise missiles fitted with nuclear warheads on Netherlands territory. They are represented by counsel.

Facts as submitted

2.1 At a meeting in Brussels on 12 December 1979, NATO defence and foreign ministers decided to deploy, as part of a plan to upgrade NATO's nuclear capabilities, 108 Pershing II missiles and 464 cruise missiles in the United Kingdom and on the continent. On 1 June 1984, the Netherlands agreed to deploy 48 cruise missiles, to be stationed on a military base near the town of Woensdrecht, if negotiations between the United States of America and the Soviet Union would have failed to produce an arms control agreement by 1 November 1985. A treaty concluded between the Governments of the Netherlands and the United States, on 4 November 1985, formed the legal basis for the deployment of the missiles. Construction work commenced on 26 April 1986 and was completed by November 1987.

2.2 In the mid-1980s the Soviet Union and the United States resumed their negotiations on a reduction of their nuclear arsenals. These negotiations led to the adoption of the Intermediate-Range Nuclear Forces (INF) Treaty on 8 December 1987. While cruise missiles had already been stationed in other European countries, the INF Treaty resulted in the cancellation of the stationing of the cruise missiles at the Woensdrecht base. No cruise missiles have therefore been deployed on Netherlands territory.

2.3 Cruise missiles are offensive weapons with a destructive capacity of 150 to 200 kilotons of trinitrotoluene (TNT), which were intended as so-called "counter-force weapons", entirely integrated into NATO's war-fighting capability. Basing themselves on documentation prepared by the World Health

Organization and the United States Army, the authors submit that the use of only one cruise missile would cause the death, from nuclear fallout, of 55 per cent of the population in an area of 120 square kilometres, and 100 per cent fatalities in an area of 90 square kilometres.

2.4 At the beginning of the 1980s, hundreds of thousands of concerned citizens of the Netherlands staged protests and mass demonstrations against the deployment of the cruise missiles. Others, convinced that the possession and possible use of cruise missiles constituted a violation of domestic and/or international law, sought court orders against deployment. A foundation, Stichting Verbiedt de kruisraketten ("Ban the Cruise Missiles Foundation") was established and entrusted with the coordination of all activities relating thereto; some 20,000 individuals, the authors among them, accepted to be plaintiffs in a court case against the Government of the Netherlands.

2.5 The authors' case was first heard before the Arrondissementsrechtbank (District Court) of The Hague, which, on 20 May 1986, held that it had no jurisdiction to hear the case. The Court of Appeal of The Hague, in its judgement of 30 December 1987, held that it was not for the courts of the Netherlands, but for Parliament, to review treaties to which the Netherlands was a party, with a view to ascertaining whether they were compatible with the State's international obligations. Therefore, the Court of Appeal assumed that the treaty on the basis of which the missiles would be deployed was compatible with international law, without further examining the question. The Supreme Court (Hoge Raad), in its decision of 10 November 1989, held that the Court of Appeal's reasoning was mistaken; however, after having examined the authors' arguments, it concluded that neither the deployment nor the possible use of cruise missiles, as provided for in the treaty, would constitute a violation of international law.

Complaint

3.1 The authors claim that the decision of the Government of the Netherlands to deploy the cruise missiles constitutes a violation of article 6 of the Covenant; they argue that a cruise missile base constitutes a target for any military enemy and that the authors could be placed in the position of accessory to a crime against humanity, with regard to the use of cruise missiles. In this connection, they refer to the case law of the European Commission of Human Rights under article 2 of the European Convention on Human Rights and the Human Rights Committee's case law under article 6 of the Covenant. a/ From this case law, they deduce that article 6 places an obligation on States parties actively to protect the life of their citizens and to avert threats to their life.

3.2 In particular, the authors invoke the Committee's General Comment 14[23] on article 6, adopted on 2 November 1984. In this document, the Committee stated that "... the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. ... The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity". The authors argue that in actually preparing for the deployment of cruise missiles, the State party has not acted in accordance with the Committee's General Comment, and therefore has violated article 6 of the Covenant.

3.3 The authors concede that the General Comment is of a general nature and that it does not reflect the Committee's view on individual complaints submitted under the Optional Protocol. On the other hand, they consider it relevant that the Committee did not limit itself to the actual use of nuclear weapons but included also forms of preparation for such use; in the present case, it is the preparation for the deployment of nuclear weapons, and the means to keep them ready for use, that is at issue.

3.4 The authors submit that if the use of the term "crimes against humanity" in the General Comment is to have any meaning, it must imply that States parties to the Covenant have the duty to do everything possible to eliminate nuclear weapons. If they participate in the formulation of plans to deploy them, they are guilty of a crime against humanity. The authors recall the origin of this concept in the Charter of the International Military Tribunal (the "Nuremberg Charter"), which, in article 6 (c), enumerates the following crimes against humanity: murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population. Article 6 of the Charter concludes as follows: "Leaders, organizers, instigators, and accomplices, participating in the formulation or execution of a common plan of conspiracy ... are responsible for all acts performed by any persons in execution of such plan".

3.5 The authors concede that the violations of their rights ceased with the signature of the INF Treaty in December 1987. However, they argue that the Optional Protocol does not require that an alleged violation is still taking place at the moment that the communication is submitted. In this context they submit that the State party never conceded that there had been such a violation; nor did it take any steps with respect to any appropriate remedy. On the contrary, the Government of the Netherlands still allows the stationing of nuclear weapons on its territory and supports a NATO strategy which contemplates resort to nuclear weapons in the event of armed conflict.

3.6 The authors argue that the fact that in the present case thousands of individuals complain collectively about violations of their rights does not turn the communication into an actio popularis, since the very nature of the alleged violation affected all the authors simultaneously. In this context, they point to the Committee's views in communication No. 167/1984, b/ according to which "[t]here is ... no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights".

3.7 The authors claim that the Government of the Netherlands placed them in a situation where a real risk of a violation of their right under article 6 existed; they consider this sufficient for a finding of a violation by the Committee. In this connection, they point to recent judgements of the European Court of Human Rights c/ and the Supreme Court of the Netherlands (Hoge Raad), d/ in which it was held that the fact of merely placing someone in a situation where he or she runs a real risk of being exposed to cruel, inhuman and degrading treatment or to the death penalty constitutes a violation of articles 2 and 3 of the European Convention.

3.8 The authors submit that the threat to the right to life was imposed on all of them since the day the conversion of Woensdrecht Air Base to a missile base started, and a fortiori after the base was ready to receive the missiles, since

it is reasonable to assume that it had by then been added to the list of possible targets for nuclear attacks drawn up by the Warsaw Pact High Command.

3.9 In addition to the claim of past violations of article 6, the authors argue that they continue to be victims of similar violations in respect of the stationing or deployment of other types of nuclear weapons on Netherlands territory. These include nuclear explosives under the control of the Navy, nuclear artillery, the so-called "Lance" missiles and weaponry carried by the nuclear capable F-16 war-planes. All of these arms are stationed on bases throughout the Netherlands, and the authors point out that the characteristics of these weapons are similar to those of the cruise missiles; in particular, the missiles carried by the F-16 plane are designed for use against the same type of targets for which the cruise missiles would have been deployed.

3.10 Since the authors' case was adjudicated by the Supreme Court of the Netherlands, they claim to have exhausted all domestic remedies. They state that the case has not been submitted to another instance of international investigation or settlement

State party's observations and authors' comments thereon

4.1 By submission of 12 March 1992 the State party argues that the communication is inadmissible, as the authors cannot be considered to be victims of an alleged violation of the Covenant under article 1 of the Optional Protocol.

4.2 The State party submits that, since the cruise missiles were never actually deployed, no risk of an alleged violation of article 6 of the Covenant has occurred, and therefore the authors cannot claim to have been victims of a violation of this article. In this context, it argues that a mere decision cannot constitute a violation of human rights, if it is not implemented: a violation cannot be claimed if the act which is alleged to be in contravention of a human right does not take place.

4.3 The State party further argues that the communication is an actio popularis and as such inadmissible under article 1 of the Optional Protocol. It submits that the interests which any citizen of a State has in not being exposed to the responses of an enemy in armed conflict do not in themselves make that citizen a victim of a violation of article 6 of the Covenant. Moreover, it argues that the authors' contention that they might be called upon to cooperate in some way in deploying or using the cruise missiles is to be rejected as insufficiently plausible.

4.4 The State party finally submits that during the domestic proceedings only the actual stationing of the 48 cruise missiles was at issue. It therefore argues that, as far as the authors contend that the mere decision to deploy cruise missiles was in itself a violation of article 6 of the Covenant, or that the presence of any nuclear weapons of any kind in the Netherlands would be a violation of article 6, domestic remedies have not been exhausted.

5.1 In his comments on the State party's submission counsel argues that the communication fulfils all admissibility criteria as enumerated in the Optional Protocol. He distinguishes between the claim concerning the Woensdrecht cruise missiles and the one regarding other nuclear weapons in the Netherlands.

According to counsel, also the second claim should be deemed admissible, although it was not brought before the courts of the Netherlands. He argues that the Supreme Court's ruling in the Cruise Missile case was of a general nature; no different ruling can be expected with regard to the legality of other nuclear weapons, and a recourse to the courts would therefore be ineffective within the meaning of article 5, paragraph 2, of the Optional Protocol.

5.2 Counsel further emphasizes that the allegation does not concern the decision in abstracto to deploy cruise missiles, but the implementation of this decision, resulting in the active preparation for deployment. This was also the subject of the domestic proceedings. Even if this were not part of the domestic procedures, counsel argues that this part of the communication should still be declared admissible, since there is no reason to expect that the courts would decide differently with regard to the preparation for deployment than with regard to the deployment itself; therefore effective domestic remedies are said not to exist.

5.3 Counsel stresses that the communication was submitted on behalf of 6,588 individuals, who all claim to be victims of a violation of their human rights by the Netherlands. To consider the communication inadmissible as an actio popularis, because many individuals claim to be similarly affected by a violation, would render the Covenant meaningless for the consideration of large-scale violations of its provisions.

5.4 As regards the State party's argument that the authors cannot be considered victims of an alleged violation, counsel argues that this question should be examined on the merits, since it regards the scope and content of the Covenant. In this connection, counsel claims that, in respect of the alleged violation of article 6 of the Covenant, there is no relevant difference between the preparation of the Woensdrecht base for the deployment of cruise missiles and their actual deployment. Counsel submits that he can make available to the Committee statements of the authors, in which they explain how they were individually affected by the State party's cooperation with the deployment.

5.5 Counsel reiterates that the effects of the (preparation of the) deployment of nuclear weapons are real enough to be seriously feared, because it renders the site a target for possible nuclear attacks. In this connection, counsel argues that a real risk of a treatment that would violate the Covenant, can by itself already constitute a violation of the Covenant. According to counsel, in the interpretation of article 6 of the Covenant, a difference should be made between conventional and nuclear weapons. The authors claim that they do not have to accept the risk of being exposed to the response of an enemy when this risk is created by acts which are in themselves a violation of international law, and that this risk in casu gives rise to a violation of article 6. In this connection, counsel cites the Committee's decision in communication No. 35/1978. e/

5.6 In reply to the State party's argument that the authors' contention that they might be called upon to cooperate in deploying or using the cruise missiles is not plausible, counsel refers to article 97 of the Constitution of the Netherlands, under which every citizen of the Netherlands can be required to participate in maintaining the independence of the kingdom and in the defence of its territory.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The authors claim that the State party's preparations for the deployment of cruise missiles in Woensdrecht and the presence in the Netherlands of other nuclear weapons violate their rights under article 6 of the Covenant. The Committee recalls in this context its second General Comment on article 6, where it observed that "the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today". f/ At the same time, the Committee notes that the procedure laid down in the Optional Protocol was not designed for conducting public debate over matters of public policy, such as support for disarmament and issues concerning nuclear and other weapons of mass destruction.

6.3 The Committee has considered the claim of the State party that the communication is in fact an actio popularis. The Committee notes that, provided each of the authors is a victim within the meaning of article 1 of the Optional Protocol, nothing precludes large numbers of persons from bringing a case under the Optional Protocol. The mere fact of large numbers of petitioners does not render their communication an actio popularis, and the Committee finds that the communication does not fail on this ground.

6.4 The Committee next considers whether the authors are victims within the meaning of the Optional Protocol. For a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice. The issue in this case is whether the preparation for the deployment or the actual deployment of nuclear weapons presented the authors with an existing or imminent violation of their right to life, specific to each of them. The Committee finds that the preparations for deployment of cruise missiles between 1 June 1984 and 8 December 1987 and the continuing deployment of other nuclear weapons in the Netherlands did not, at the relevant period of time, place the authors in the position to claim to be victims whose right to life was then violated or under imminent prospect of violation. Accordingly, after careful examination of the arguments and materials before it, the Committee finds that the authors cannot claim to be victims within the meaning of article 1 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 1 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the authors and to their counsel.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ Reference is made, inter alia, to the Committee's decisions in communications Nos. 84/1981 (Dermit Barbato v. Uruguay), views adopted on 21 October 1982; 30/1978 (Bleier v. Uruguay), views adopted on 29 March 1982; and 161/1983 (Herrera Rubio v. Colombia), views adopted on 2 November 1987.

b/ Ominayak v. Canada, views adopted on 26 March 1990, para. 32.1.

c/ Soering Case, judgement of 7 July 1989 (Publications of the European Court of Human Rights, Series A: Judgements and Decisions, vol. 161).

d/ S. v. The Netherlands, judgement of 30 March 1990.

e/ S. Aumeerruddy-Cziffra et al. v. Mauritius, views adopted on 9 April 1981.

f/ CCPR/C/21/Add.4, General Comment 14 [23], para. 4.

H. Communication No. 432/1990, W. B. E. v. the Netherlands (decision of 23 October 1992, adopted at the forty-sixth session)

Submitted by: W. B. E. (name deleted)

Alleged victim: The author

State party: The Netherlands

Date of communication: 20 July 1990 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 October 1992,

Adopts the following:

Decision on admissibility

1. The author of the communication is W. B. E., a Dutch businessman residing in Amsterdam. He claims to be the victim of a violation by the Netherlands of articles 9, paragraphs 3 and 5, and 14, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights.

Facts as submitted

2.1 The author was detained from 10 December 1979 to 27 April 1980 on suspicion of involvement in drug smuggling activities. On 27 March 1980 the District Court (Arrondissementsrechtbank) of Haarlem acquitted him of the charges on a point of law. The Public Prosecutor appealed to the Amsterdam Court of Appeal (Gerechtshof), which, on 29 December 1980, acquitted the author, considering that the charges against him had not been proven lawfully and convincingly.

2.2 On 20 March 1981, the author submitted two petitions to the Amsterdam Court of Appeal, pursuant to articles 89 and 591a of the Dutch Code of Criminal Procedure (Wetboek van Strafvordering), for award of compensation for damages resulting from the time spent in detention and from lost revenue (altogether DFL 19,612,550). By decision of 10 February 1982, the Court rejected his petitions on the ground that, although he had been acquitted of the charges against him, the evidence produced at the trial showed that he had been closely involved in the realization of the plan for the illegal import of a substantial amount of heroin and had played an important role in the transport.

2.3 On 15 February 1982, the author appealed this decision to the Supreme Court (Hoge Raad), which, on 20 April 1982, declared his appeal inadmissible, on the ground that under Dutch law a refusal of the Court of Appeal to grant compensation is not appealable.

2.4 On 14 October 1983, the author initiated a civil action against the State before the District Court of The Hague (Arrondissementsrechtbank), with a view to having declared void the Amsterdam Court of Appeal judgement of 10 February 1982. The Court rejected his request on 10 April 1985. His

subsequent appeal against this decision was rejected by The Hague Court of Appeal on 11 December 1986. This judgement was confirmed by the Supreme Court on 25 November 1988.

2.5 On 15 October 1983, the author filed an application with the European Commission of Human Rights, which declared it inadmissible on 6 May 1985.

Complaint

3.1 The author claims that his continued detention constituted a violation of article 9, paragraph 3, of the Covenant. He acknowledges that a reasonable suspicion that criminal acts had taken place was present in his case, but contends that continued pre-trial detention should only be allowed in order to prevent flight or the commitment of further crimes. The author claims that, in the absence of serious grounds to assume that he would leave the jurisdiction or commit further crimes, 107 days of pre-trial detention was unreasonably long. He submits that he had offered bail, but that this offer was ignored by the Dutch authorities.

3.2 The author further claims that he has a right to compensation, pursuant to article 9, paragraph 5, since he was acquitted of the charges against him. In his opinion, the ground given by the Court of Appeal to reject his petitions for compensation constitutes a violation of article 14, paragraph 2, of the Covenant. He argues that this provision must be interpreted broadly and should also apply to procedures for compensation following acquittal of a criminal charge.

3.3 Finally, he claims that the decisions rejecting his petitions pursuant to articles 89 and 591a of the Code of Criminal Procedure were beset with irregularities which constitute a violation of article 14, paragraph 1. With respect to his petition under article 89, he points to two irregularities: firstly, the Chamber (Raadkamer) of the Amsterdam Court of Appeal was not composed of the judges who had previously decided on the criminal case, as is prescribed by law, and secondly, one of the judges participating in the decision had not even taken part in the examination of his request. With respect to the rejection of his petition under article 591a, the author claims that the written judgement of the Court of Appeal did not permit the identification of its signatories. The author alleges that the refusal to grant him compensation is the direct result of the composition of the Chamber.

State party's observations and the author's comments thereon

4.1 By submission, dated 25 October 1991, the State party argues that the communication is inadmissible on the grounds of non-exhaustion of domestic remedies, non-substantiation of the allegations, and incompatibility of the claims with the Covenant.

4.2 The State party contends that the author has not exhausted domestic remedies, since he never invoked the substantive rights of the Covenant during the domestic procedures, although he had the opportunity to do so.

4.3 As regards the author's allegation that article 9, paragraph 3 of the Covenant was violated by keeping him in pre-trial detention for 107 days, the State party refers to its legislation, which prescribes that detention, after an

initial 4 days, be ordered by an examining magistrate, and after another 12 days, by the District Court. The District Court can only order detention not exceeding 30 days, which period may be extended twice. Grounds on which pre-trial detention may be ordered are laid down in articles 67 and 67a of the Code of Criminal Procedure, and only apply when there is a high level of evidence that the suspect committed a serious crime, carrying a prison sentence of 4 years or longer.

4.4 The State party argues that the author's detention was in accordance with the law, given the seriousness of the suspicions against him. The Court ordered his detention under article 67a, paragraph 2.3 of the Code, which provides that pre-trial detention can be lawfully imposed if it is reasonable to suppose that this is necessary to enable the facts to be established, other than through statements made by the suspect. The State party argues that the detention was necessary in order to prevent the investigation from being impeded by the author influencing fellow suspects and witnesses, and obliterating the traces of the offence in other ways.

4.5 As regards the author's allegation that article 9, paragraph 5, has been violated, the State party submits that serious suspicions existed that the author had committed criminal offences and that his detention was not unlawful. Thus, the State party argues that this part of the communication should be declared inadmissible as incompatible with the provisions of the Covenant.

4.6 With regard to the alleged violation of article 14, paragraph 2, the State party argues that this provision applies to criminal proceedings only, and not to proceedings to assess compensation for damages resulting from detention.

4.7 With regard to the alleged violation of article 14, paragraph 1, the State party submits that the composition of the Chamber hearing an application for compensation is regulated in article 89, paragraph 4, of the Code of Criminal Procedure. This provision stipulates that, in so far as it is possible, the Chamber shall be composed of the members of the Court who were present at the trial. The State party argues that this, however, is not a binding rule, and largely enacted for practical reasons. It argues that the fact that the Court in chambers had a different composition from the Court which had heard the criminal case does not imply that the decision was not arrived at independently and in objectivity, or that it was biased.

4.8 Moreover, the State party argues that article 14, paragraph 1, of the Covenant does not apply to the proceedings under article 89 of the Code of Criminal Procedure. It contends that these constitute neither the determination of a criminal charge nor of a civil right in a suit at law.

5.1 In his comments on the State party's submission, the author argues that he was not obliged to invoke the articles of the Covenant during the domestic procedures. He submits that he has exhausted all domestic remedies.

5.2 The author concedes that the statutory procedure regarding pre-trial detention is, as such, consistent with the provisions of the Covenant under article 9. However, he argues that the application of the statutory p ovisions in his case led to unlawful deprivation of his liberty. He denies the presence of serious reasons to suspect that he was involved in drug smuggling.

5.3 In this connection, he submits that, in 1979, he was working as a police informer, and in this capacity he allegedly informed an Amsterdam police chief inspector about a shipment of heroin from Turkey to the Netherlands. However, according to the author, due to a power struggle within the police, the intervention with the shipment failed, and the author's informer, a Turkish acquaintance, was killed. The author then decided to discontinue working for the police inspector.

5.4 The author contends that his arrest, on 10 December 1979, was a direct attempt to shift the responsibility of the failing narcotics policy of the police department to him, by qualifying his activities as a police informer as crimes. He submits that there was no reason for the Public Prosecutor to believe that he had acted otherwise than under orders and as a police informer.

5.5 The author claims therefore that his detention was unlawful, and that he was entitled to compensation under article 89 of the Code of Criminal Procedure. Since this compensation wa denied to him, he maintains that he is a victim of a violation of article 9, paragraph 5.

5.6 As regards the alleged violation of article 14, paragraph 2, the author argues that the compensation proceedings under articles 89 and 591a of the Code of Criminal Procedure are a continuation of the criminal proceedings. He reiterates his allegation that the Court of Appeal violated his right to be presumed innocent, when it considered that there was evidence that he had been closely involved in the illegal import of heroin.

5.7 As regards the compensation proceedings, the author maintains that he was denied a fair hearing by an impartial tribunal; since the judges were not familiar with his case, he alleges that the Public Prosecutor was in a position to influence their decision. He further submits that compensation after unlawful detention is a civil right and that article 14, paragraph 1, therefore applies also to the determination of compensation after unlawful arrest.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the State party's argument that the author has not exhausted domestic remedies because he did not invoke the relevant provisions of the Covenant before the Dutch courts, the Committee observes that, whereas the authors must invoke the substantive rights contained in the Covenant, they are not required, for purposes of the Optional Protocol, to do so by reference to specific articles of the Covenant. a/ The Committee observes that in the instant case, the author contested his detention and claimed compensation through available domestic remedies, and thereby invoked the substantive rights contained in articles 9 and 14 of the Covenant.

6.3 With regard to the author's allegation that his pre-trial detention was in violation of article 9 of the Covenant, the Committee observes that article 9, paragraph 3, allows pre-trial detention as an exception; pre-trial detention may be necessary, for example, to ensure the presence of the accused at the trial, avert interference with witnesses and other evidence, or the commission of other

offences. On the basis of the information before the Committee, it appears that the author's detention was based on considerations that there was a serious risk that, if released, he might interfere with the evidence against him.

6.4 The Committee considers that, since pre-trial detention to prevent interference with evidence is, as such, compatible with article 9, paragraph 3, of the Covenant, and since the author has not substantiated, for purposes of admissibility, his claim that there was no lawful reason to extend his detention, this part of the communication is inadmissible under articles 2 and 3 of the Optional Protocol.

6.5 With regard to the author's allegation that his right to compensation under article 9, paragraph 5, was violated, the Committee recalls that this provision grants victims of unlawful arrest or detention an enforceable right to compensation. The author, however, has not substantiated, for purposes of admissibility, his claim that his detention was unlawful. In this connection, the Committee observes that the fact that the author was subsequently acquitted does not in and of itself render the pre-trial detention unlawful. This part of the communication is therefore inadmissible under articles 2 and 3 of the Optional Protocol.

6.6 With respect to the author's allegation of a violation of the principle of presumption of innocence enshrined in article 14, paragraph 2, of the Covenant, the Committee observes that this provision applies only to criminal proceedings and not to proceedings for compensation; accordingly, it finds that this claim is inadmissible under article 3 of the Optional Protocol.

6.7 With regard to the author's allegation that the hearing regarding his claim for compensation was unfair, the Committee observes that he has not substantiated it, for purposes of admissibility, and that he has failed to advance a claim under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be transmitted to the State party and to the author.

[Done in English, French, Russian and Spanish, the English text being the original version.]

Notes

a/ See communication No. 273/1988 (B. d. B. v. the Netherlands), declared inadmissible on 30 March 1989.

I. Communication No. 450/1991, I. P. v. Finland (decision of 26 July 1993, adopted at the forty-eighth session)

Submitted by: I. P. (name deleted)

Alleged victim: The author

State party: Finland

Date of communication: 30 July 1990 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication is I. P., a Finnish citizen, born in 1945, and at present residing in Naarajärvi, Finland. He claims to be a victim of violations by Finland of articles 2, 5, 14 and 17 of the Covenant.

Facts as submitted

2.1 In 1979, the author founded a data-processing company, but continued to work as an employee in another company until 1983, when he became an independent businessman. In November 1985, a tax audit was conducted over the books of two companies, H. K. and N. O., with which the author had concluded business contracts; the author had worked as an employee for one of these companies before starting his own business. On 27 June 1986, the provincial Tax Office ordered the two companies to pay taxes and social security contributions on the author's salary, since, according to the audit, the author was fulfilling his duties towards these companies as an employee, and not as a business partner. According to the author, the tax inspectors wrongly informed the companies that he was three years in arrears with the payment of his taxes.

2.2 Subsequently, the two companies deducted the amount paid in taxes from the payment they owed the author, thereby causing him financial distress, which threatened the continuity of his business. Thereupon, the author addressed a letter to the Tax Office, requesting it to annul its decision of 27 June 1986; the Tax Office treated the letter as a complaint and forwarded it to the Administrative County Court. The Court, in December 1986, dismissed the case since the author had no standing to appeal, as the decision concerned companies H. K. and N. O., and not the author.

2.3 In May 1987, the author started a civil action against the two companies to recover the amount they owed him. The case was dismissed by the District Court of Pieksämäki in July 1987. In April 1989, the Court of Appeal ordered the companies to pay the author the full amount of their outstanding debts. Thereupon the companies paid the author, but deducted a certain percentage. The

author then filed a complaint with the East Finland Court of Appeal, in order to collect the percentage.

2.4 On 3 September 1987, the author filed a criminal complaint of slander against the tax inspectors, since they allegedly had disclosed false information about him to the two companies. In December 1987, the author was informed that the investigation was discontinued. The author then complained to the Parliamentary Ombudsman, who concluded, in September 1989, that there was no evidence of an incorrect decision by the tax inspectors.

2.5 In April 1988, the author learned that the police were conducting a criminal investigation against him, for false denunciation. At the end of 1988, he was informed that the investigation was discontinued. In turn, the author, in October 1988, filed a request for criminal prosecution of the rural deputy police chief, likewise for false denunciation. However, the County Prosecutor decided not to initiate a prosecution, for lack of evidence; the author was informed of this decision in July 1989.

2.6 The author further has certain grievances against the tax board and tax appeal board, which stem from a complaint against his tax assessment for 1986. He filed a criminal complaint with the police against the Rural Tax Inspector for forgery of documents pertaining to his case. The Public Prosecutor, however, refused to initiate prosecution, on the ground that there was no evidence that a criminal act had been committed.

2.7 In November 1989, the author requested the public prosecutor of the East Finland Court of Appeal to begin a criminal investigation against the tax authorities. On 3 April 1990, the prosecutor informed the author that, after a preliminary investigation, he had decided not to prosecute.

2.8 In February 1990, the author requested the County Tax Office Director to take action against its employees because of their alleged negligence in his case. The Office refused to take action. The author then filed a complaint with the Administrative County Court; he further requested the Director General of the National Board of Taxation to order the County Tax Director to reply to his letters and to correct her mistakes. The Director General did not respond to his request. In May 1990, the Administrative County Court upheld the decision of the County Tax Office not to start investigations.

Complaint

3. The author claims to be a victim of a violation of article 17 of the Covenant, since the tax inspectors disclosed sensitive information about the payment of his taxes to third parties. The author claims that this information was false, and that the tax officials did not give him an opportunity to correct the information given, nor corrected it themselves. He further claims to be a victim of a violation of article 14, since, in determining his status as employee, decisions affecting his rights and obligations were made without hearing him, and he had no right to appeal these decisions.

State party's observations and the author's comments thereon

4.1 The State party, by submission of 14 October 1991, argues that the communication is inadmissible on the grounds of non-exhaustion of domestic remedies and incompatibility with the provisions of the Covenant.

4.2 As regards the author's complaint under article 17 of the Covenant, the State party concedes that the author has filed criminal complaints against the tax inspectors with the police. However, it submits that the author has not pursued his constitutional right to bring a private action against the officials concerned. The State party argues that this remedy has in similar cases led to an effective prosecution of public officials.

4.3 The State party further submits that the disclosure of information by the Tax Office was based on legal regulations and was necessary in order to determine the taxation of the two companies involved. It argues that the author has failed to substantiate his claim that the disclosure violated his rights under article 17 of the Covenant.

4.4 As regards the author's claim that he is a victim of a violation of article 14, since he was not heard in the administrative procedure, the State party argues that the Tax Office's decision to order the author's employers to pay taxes had no effect on the legal position of the author. It further argues that, if the Tax Office would have decided, upon receipt of the author's tax return concerning the fiscal year 1985, that he was an employee rather than an independent businessman, this decision would have been subject to appeal with the County Administrative Court. However, the State party notes that the author did not file tax returns for the fiscal years 1985, 1986 and 1987, but only for 1983 and 1984.

4.5 The State party further argues that the imposition of a tax or matters of taxation in general do not constitute the determination of rights and obligations in a suit at law.

5. The author, on 17 December 1991, informed the Committee that he intended to comment on the State party's submission by January 1992. However, no comments were received, in spite of a reminder sent on 19 June 1992.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee turns first to the author's claim under article 14. The Committee notes that whether matters relating to the imposition of taxes are or are not "rights or obligations in a suit at law" does not have to be determined, because in any case the author was not denied the right to have his claims concerning the decision by the Tax Office heard before an independent tribunal. As for the author's claim that he was denied the possibility of appeal, even were these matters to fall within the scope ratione materiae of article 14, the right to appeal relates to a criminal charge, which is not here in issue. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol.

6.3 As regards the author's claim that the disclosure by tax inspectors of information concerning the author's payment of taxes constitutes a violation of article 17 of the Covenant, the Committee notes that the State party has argued that domestic remedies exist, which the author may still pursue. The Committee also notes that the State party submits that the disclosure of the information was based on lawful regulations and necessary to determine the taxation of the companies H. K. and N. O. The Committee observes that article 17 protects everyone from arbitrary or unlawful interference with his privacy and from unlawful attacks on his honour and reputation. After careful examination of the information before it, the Committee considers that the author has not substantiated, for purposes of admissibility, his claim that he was a victim of an arbitrary and unlawful interference with his privacy, nor that the disclosure of information by the tax inspectors could constitute an unlawful attack on his honour and reputation. These aspects of the communication are, therefore, inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Done in English, French and Spanish, the English text being the original version.]

J. Communication No. 467/1991, V. E. M. v. Spain (decision of 16 July 1993, adopted at the forty-eighth session)

Submitted by: V. E. M. (name deleted)

Alleged victim: The author

State party: Spain

Date of communication: 27 May 1991 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication is V. E. M., a Spanish citizen born in 1935, currently residing in Barcelona. He claims to be a victim of violations by Spain of articles 3, 7, 14, paragraphs 1, 2, 3 (a) to (e), 5, 17 and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel. The Optional Protocol entered into force for Spain on 25 April 1985.

Facts as submitted

2.1 In 1975, the author, a former military officer, was excluded from service in the Spanish Army by decision of a special tribunal (Tribunal de Honor), which found him guilty of having tolerated the alleged dishonourable lifestyle of his wife. According to the author, the charges against him were fabricated and unsubstantiated, and the tribunal was constituted for reasons totally different from those that led to his discharge from the army. He submits that the principal witness before the Tribunal committed perjury, and that letters attributed to the author which accused high-ranking military officers of corruption - letters of which he claims to have no knowledge - were used as evidence against him. Under article 40, litera (a), of the (old) Code of Military Procedure (1945), the Tribunal's decision could not be appealed.

2.2 In 1985, the author learned that the above provision of the Code of Military Procedure had been declared unconstitutional. He therefore filed an application for revision of the decision of 1975 with the Ministry of Defence. This was followed by an administrative complaint filed with an administrative tribunal (audiencia nacional), requesting a declaratory judgement to the effect that the decision of 1975 had been null and void. He claimed, in particular, that the proceedings before the Tribunal de Honor had failed to observe the minimum guarantees of the defence.

2.3 On 28 June 1988, the Military Chamber of the Supreme Court (Sala de lo Militar) dismissed the case on the ground that the conditions of article 127 of the law governing administrative procedures for the revision of final (judicial) decisions had not been met. The judgement further held that the author's appeal

was inadmissible because it fell under the relevant statutes of limitations, since the deadline for filing the appeal had begun to run from the date of entry into force of the Constitution (1978); two judges of the Supreme Court appended dissenting opinions to the judgement of 28 June 1988.

2.4 The author further appealed to the Constitutional Tribunal (recurso de amparo). This was declared inadmissible by decision (auto) of the Constitutional Court on 23 February 1989.

2.5 On 22 April 1989, the author filed a complaint under article 6 of the European Convention on Human Rights (guarantee of a fair trial) with the European Commission of Human Rights. On 15 June 1989, the Commission registered it as case No. 15.124/89. On 11 October 1989, the case was declared inadmissible because the Commission held that the guarantee of article 6 of the Convention did not cover disputes about public service, neither the question of access to it nor the dismissal from it.

Complaint

3. The author contends that the facts described above constitute violations of the following provisions of the Covenant:

(a) Article 3, since the State party never guaranteed the equal enjoyment of his or of his wife's rights under the Covenant;

(b) Article 7, since the fact of being accused without so much as the possibility of defending himself against the charges is said to amount to an attack on his honour and to constitute degrading treatment;

(c) Article 14, paragraph 1, since he was never afforded equality before the courts, either before the Tribunal de Honor or the Military Chamber of the Supreme Court, as neither of them heard him publicly and allegedly were partial to the arguments of the military prosecutors;

(d) Article 14, paragraph 2, since he was deemed guilty in the absence of tangible proof;

(e) Article 14, paragraph 3 (a) to (e), since the minimum rights of the defence, such as adequate time for the preparation of his defence and the right to choose his own counsel or to call witnesses, were not respected;

(f) Article 14, paragraph 5, because he was unable to appeal the decision of the Tribunal de Honor;

(g) Article 17, because he suffered unlawful attacks on his honour and his reputation as a result of the very procedure before the Tribunal de Honor and the latter's decision;

(h) Article 26 because, as the result of unjust and partial judicial decisions, he has been subjected to discrimination.

State party's information and observations and author's comments

4.1 In its submission under rule 91 of the rules of procedure, the State party contends that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, as the same matter was already examined and declared inadmissible by the European Commission of Human Rights. It recalls that upon ratifying the Protocol, Spain entered a reservation in respect of article 5, paragraph 2 (a), to the effect "... that the Committee shall not consider any communication from an individual unless it has ascertained that the same matter has not been submitted or is not being examined under another procedure of international investigation or settlement" ("... que el Comité de Derechos Humanos no considerará ninguna comunicación de un individuo a menos que se haya cerciorado de que el mismo asunto no ha sido sometido o no lo esté siendo a otro procedimiento de examen o arreglo internacionales").

4.2 In his comments, the author concedes that his complaint to the European Commission of Human Rights was based on the same facts as his communication to the Human Rights Committee, but contends that the European Commission never "examined" the matter, since it simply dismissed the complaint as not within the scope of protection of the European Convention on Human Rights.

Issues and proceedings before the Committee

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has taken note of the parties' arguments relating to the applicability of article 5, paragraph 2 (a), of the Optional Protocol. It notes that the Spanish reservation on article 5, paragraph 2 (a), precludes the examination of the same matter if it had been submitted to the European Commission. Notwithstanding that the author's case before the European Commission was summarily dismissed as inadmissible under the Convention, it had none the less been "submitted" thereto. Accordingly, in the light of the Spanish reservation to article 5, paragraph 2 (a), of the Optional Protocol, the Committee is precluded from considering the communication.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and the author of the communication.

[Done in English, French and Spanish, the English text being the original version.]

K. Communication No. 478/1991, A. P. L.-v. d. M. v. the Netherlands (decision of 26 July 1993, adopted at the forty-eighth session)

Submitted by: A. P. L.-v. d. M. (name deleted)

Alleged victim: The author

State party: The Netherlands

Date of communication: 27 October 1991 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication (dated 22 October 1991) is Mrs. A. P. L.-v. d. M., a Netherlands citizen, residing in Voorhout, the Netherlands. She claims to be a victim of a violation by the Netherlands of article 26 of the International Covenant on Civil and Political Rights. She is represented by counsel.

Facts as submitted

2.1 The author, who is married, was employed as a seasonal worker during part of the year as of July 1982. During the intermittent periods of unemployment, she received unemployment benefits by virtue of the Werkloosheidswet (WW) (Unemployment Act). Pursuant to the provisions of the Act, the benefit was granted for a maximum period of six months. On 2 March 1984 the author, who was then unemployed, was no longer entitled to WW benefits. She was subsequently re-employed on 25 July 1984.

2.3 After having received benefits under the WW, an unemployed person at that time was entitled to benefits under the Wet Werkloosheids Voorziening (WWV) (Unemployment Benefits Act). These benefits amounted to 75 per cent of the last salary, whereas the WW benefits amounted to 80 per cent of the last salary. However, article 13, paragraph 1, subsection 1, of the law provided that married women could only receive WWV benefits if they qualified as breadwinners. A similar requirement did not apply to married men. The author, who did not meet this requirement, therefore did not apply for benefits at that time.

2.4 However, after the State party had abolished the requirement of article 13, paragraph 1, subsection 1, with a retroactive effect to 23 December 1984, the author, on 22 January 1989, applied for benefits under the WWV, for the period of 2 March to 25 July 1984. The author's application was rejected by the municipality of Voorhout, on 8 June 1989, on the ground that the author did not meet the statutory requirements which were applicable at the material time.

2.5 On 19 December 1989, the municipality confirmed its decision. The author then appealed to the Raad van Beroep (Board of Appeal) in The Hague, which, by decision of 27 June 1990, rejected her appeal.

2.6 The Centrale Raad van Beroep (Central Board of Appeal), the highest instance in social security cases, in its judgement of 5 July 1991, referred to its judgement of 10 May 1989 in the case of Mrs. Cavalcanti Araujo-Jongen, a/ in which it found, as it had done in previous cases, that article 26, read in conjunction with article 2, of the International Covenant on Civil and Political Rights, applied to the granting of social security benefits and similar entitlements and that the explicit exclusion of married women from WWV benefits, except if they meet specific requirements that are not applicable to married men, amounted to discrimination on the ground of sex in relation to marital status. However, the Central Board found no reason to depart from its established jurisprudence that, with regard to the elimination of discrimination in the sphere of national social security legislation, in some situations gradual implementation may be allowed. The Central Board concluded that, in relation to article 13, paragraph 1, subsection 1, of WWV, article 26 of the Covenant had acquired direct effect not before 23 December 1984, the final date established by the Third Directive of the European Community (EC) for the elimination of discrimination between men and women within the Community. It therefore confirmed the decision of the Board of Appeal to refuse the author benefits under WWV for the period of 2 March to 25 July 1984. With this judgement, all domestic remedies are said to have been exhausted.

2.7 In 1991, further amendments to the WWV abolished the restriction on the retroactive effect of the abolishment of article 13, paragraph 1, subsection 1. As a result, women who had been ineligible in the past to claim WWV benefits because of the breadwinner criterion, can claim these benefits retroactively, provided they satisfy the other requirements of the Act. One of the other requirements is that the applicant must be unemployed on the date of application.

Complaint

3.1 In the author's opinion, the denial of WWV benefits for the period of 2 March to 25 July 1984 amounts to discrimination within the meaning of article 26 of the Covenant.

3.2 The author recalls that the Covenant and the Optional Protocol entered into force for the Netherlands on 11 March 1979, and argues that, accordingly, article 26 acquired direct effect on that date. She further contends that the date of 23 December 1984, as of which the distinction under article 13, paragraph 1, subsection 1, WWV was abolished, is arbitrary, since there is no formal link between the Covenant and the Third EC Directive.

3.3 She also claims that the Central Board of Appeal had not, in earlier judgements, taken a consistent stand with respect to the direct applicability of article 26 of the Covenant. For example, in a case pertaining to the General Disablement Act (AAW), the Central Board decided that article 26 could not be denied direct effect after 1 January 1980.

3.4 The author claims that the Netherlands had, upon ratifying the Covenant, accepted the direct effect of its provisions, pursuant to articles 93 and 94 of

the Netherlands Constitution. She further argues that, even if the possibility of gradual elimination of discrimination were permissible under the Covenant, the transitional period of over 12 years between the adoption of the Covenant in 1966 and its entry into force for the Netherlands in 1979, should have been sufficient to enable it to adapt its legislation accordingly. In this context, the author refers to the views of the Human Rights Committee in communications Nos. 182/1984 (Zwaan-de Vries v. the Netherlands) b/ and 172/1984 (Broeks v. the Netherlands). c/

3.5 The author submits that the amendments recently introduced in WWV do not eliminate the discriminatory effect of article 13, paragraph 1, subsection 1, WWV as applied prior to December 1984. The author points out that women can only claim these benefits retroactively if they meet the requirements of all the other provisions of WWV, especially the requirement that they are unemployed at the time of the application for WWV benefits. Thus, women who, like the author, are employed at the time of applying for retroactive benefits, do not fulfil the legislative requirements and are therefore not entitled to a retroactive benefit. According to the author, therefore, the discriminatory effect of said WWV provision has not been completely eliminated.

3.6 The author claims that she suffered financial damage as a result of the application of the discriminatory WWV provisions, in the sense that benefits were denied to her for the period of 2 March to 25 July 1984. She requests the Human Rights Committee to find that article 26 acquired direct effect as from the date on which the Covenant entered into force for the Netherlands, i.e. 11 March 1979; that the denial of benefits on the basis of article 13, paragraph 1, subsection 1, of WWV is discriminatory within the meaning of article 26 of the Covenant; and that WWV benefits should be granted to married women on an equal footing with men as of 11 March 1979, and in her case as of 2 March 1984.

State party's observations and the author's comments thereon

4. By submission, dated 2 September 1992, the State party concedes that the author has exhausted all available domestic remedies. The State party, however, argues that the author cannot be considered to be a victim within the meaning of article 1 of the Optional Protocol, since, even if the benefits would be available to married women on an equal footing with men as of 2 March 1984, the author still would not be eligible to these benefits, since she did not fulfil one of the basic requirements in the law, which is applicable to both men and women, that a person applying for benefits be unemployed at the date on which the application is made.

5. In her comments on the State party's submission, the author submits that the date of the application never was at issue in the prior proceedings, which focused on the date of 23 December 1984, in connection with the Third Directive of the European Community. She states that the issue before the Committee is whether article 26 of the Covenant has direct effect for the period preceding 23 December 1984, and not whether she fulfilled the requirement of being unemployed on 22 January 1985, the date of her application for benefits under WWV.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the author claims that the state of the law from March to July 1984, and the application of the law at that time, made her a victim of a violation of the right to equality before the law and equal protection of the law, as set out in article 26 of the Covenant. The Committee further notes that the State party has amended the legislation in question, abolishing with retroactive effect the provision in the law which the author considers discriminatory.

6.3 The Committee considers that, even if the law in question, prior to the enactment of the amendment, were to be considered inconsistent with a provision of the Covenant, the State party, by amending the law retroactively, has corrected the alleged inconsistency of the law with article 26 of the Covenant, thereby remedying the alleged violation. Therefore, the author cannot, at the time of submitting the complaint, claim to be a victim of a violation of the Covenant. The communication is thus inadmissible under article 1 of the Optional Protocol.

6.4 The author further contends that she is a victim of discrimination because the application of the amended law still does not entitle her to benefits for the period of her unemployment from March to July 1984, since she does not fulfil the requirement of being unemployed on the date of application for the benefits. In this connection, the Committee notes that said requirement applies to men and women equally. The Committee refers to its decision in communication No. 212/1986 (P. P. C. v. the Netherlands), in which it considered that the scope of article 26 did not extend to differences of results in the application of common rules in the allocation of benefits. In the present case, the Committee finds that the requirement of being unemployed at the time of application as a prerequisite for entitlement to benefits is not discriminatory and that the author does not, therefore, have a claim under article 2 of the Optional Protocol.

6.5 As regards the author's request that the Committee make a finding that article 26 of the Covenant acquired direct effect in the Netherlands as from 11 March 1979, the date on which the Covenant entered into force for the State party, the Committee observes that the method of application of the Covenant varies among different legal systems. The determination of the question whether and when article 26 has acquired direct effect in the Netherlands is therefore a matter of domestic law and does not come within the competence of the Committee.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ Mrs. Cavalcanti's case was registered before the Human Rights Committee as communication No. 418/1990 and declared admissible on 20 March 1992.

b/ Views adopted on 9 April 1987.

c/ Views adopted on 9 April 1987.

L. Communication No. 485/1991, V. B. v. Trinidad and Tobago (decision of 26 July 1993, adopted at the forty-eighth session)

Submitted by: V. B. (name deleted)

Alleged victim: The author

State party: Trinidad and Tobago

Date of communication: 28 November 1991

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication is V. B., a Trinidadian citizen, currently awaiting execution at the State Prison in Port-of-Spain, Trinidad and Tobago. He claims to be a victim of violations by Trinidad and Tobago of article 14, paragraphs 1 and 3 (c), of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 The author was convicted of the murder, on 1 August 1979, of his common-law wife, P. M. The Court of Appeal quashed the author's conviction and sentence at the first trial, on the ground of a misdirection to the jury by the trial judge on a point of law, and ordered a retrial. a/ The retrial was held on 13 March 1986, before the Port-of-Spain Assizes Court. The author was again found guilty and sentenced to death. The Court of Appeal dismissed his appeal on 16 June 1989. His petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 14 October 1991. With this, it is submitted, all domestic remedies have been exhausted.

2.2 The prosecution's case was based on the evidence of several witnesses. An eye-witness, A. H., testified that, on 1 August 1979 at about 6.45 p.m., he stopped by the house where the deceased, her family and the author were living. The author, together with P. M., who was holding her 11-month-old baby, and one J. A., were sitting outside, opposite to the family home. He sat down with them. After a while, V. B. called him aside and told him that he was having problems with his wife and her family, and allegedly said: "I feel like killing all of them". After buying some drinks, J. A. and he returned to the steps where P. M. was still sitting. The author was standing at the gate of the house, watching them. Upon P. M.'s request, the author brought the baby inside; he then returned, called P. M. and they both sat down on a nearby bench. A. H. further testified that he did not hear the author and P. M. quarrelling, nor did he see them struggling, but shortly afterwards he heard her calling "Oh God", and saw her running towards the house, bleeding heavily, then collapsing in the

yard. The author, who had a shining object in his hand, ran away from the scene. P. M. was brought to the hospital, where she died. The post mortem examination disclosed that she had sustained three stab wounds.

2.3 P. M.'s sister testified that when returning home, she saw the author walking down the street. Upon asking him where he was going, he replied that he had just stabbed her sister three times; he further advised her to go to the hospital to find out whether P. M. had died.

2.4 The arresting officer gave evidence that the author had refused to leave the house where he was hiding, and that he threatened to stab himself if the police entered the house. Upon entering the house, the police found him with a small wound on his chest, which the author said was self-inflicted with a pair of scissors. He was taken to the hospital where he remained for eight days. The police officer further testified that the author, after cautioning, said that he and P. M. had had an argument over a pack of cigarettes, and that he had stabbed her with a knife.

2.5 The author gave evidence from the witness stand. He testified that he had had an argument with his wife because of the way in which she was dressed in the company of two other men. After he had taken the baby inside, he returned and requested her to come inside. She became angry, and began fighting when they entered the yard. She picked up a knife and tried to stab him. As a result, he sustained a slight cut on the hand and on the chest. He then became frightened, lost control, and only remembered "pelting" a blow at her with the knife she had. He further stated that he did not know how she got three stab wounds, or how he got possession of the knife. He denied having made the alleged remarks to the prosecution witnesses. Under cross-examination, the author admitted that he had stabbed P. M., but could not recall how many times.

2.6 J. A., who had been a witness for the prosecution at the first trial, was called as a witness for the defence at the retrial. While giving evidence, he was manifestly under the influence of alcohol and/or drugs; his evidence was prejudicial to the defence, as it situated the incident in the street and not in the yard, as the author contended. The defence, however, did not request the judge to adjourn the trial to allow the witness to "sober up".

2.7 In her address to the jury, the author's attorney stressed that the defence was one of provocation. The judge, in his summing-up, left the issues of self-defence and accidental death to the jury but, it is claimed, he appeared to suggest that the jury was already decided on the facts. He stated:

> "Now I will go through very briefly the evidence in the case, members of the jury. Perhaps we can get our bearings from the photographs first of all. I am sure it is very clear in your mind, but nevertheless as a trial judge I have to do my duty and, at least, review the evidence with you briefly. If I don't, the next thing you may hear if you return a verdict of guilty, is that counsel for the defence files an appeal and says the trial judge erred in law for not reviewing the evidence for the defence with the jury. We want not to have that sort of thing happen, so I have a job to do. So bear with me, although I am sure you have these facts very clearly in your mind, and perhaps by now most or all of you have decided this case already, I don't know, please don't, wait a little while before you come to any conclusion".

2.8 The Court of Appeal described J. A.'s evidence as having "knocked the bottom out of the [author's] case". Furthermore, the Court of Appeal accepted that a trial judge should not allow an unfit witness to give evidence, and that if an opportunity is not given for such witness to "sober up", an accused may be severely prejudiced in his defence. It found, however, that "before a verdict can be quashed on that ground it should be established, inter alia, that the evidence [J. A.] was expected to give was favourable to the defence, for only then it might be said that the defence was prejudiced; and we would expect that a request for an adjournment would be made in the circumstances". The Court of Appeal then considered the evidence which J. A. would have been likely to give, on the basis of his deposition taken at the preliminary enquiry (when he was a witness for the prosecution), and concluded that the author's defence was not prejudiced, and that J. A.'s version of the incident would be likely to support the prosecution. It concluded that: "To suggest that J. A. could have given, if sober, evidence favourable to the [author] is mere conjecture and there is, in our view, little surprise that no request was made by the defence for an adjournment to accommodate him".

Complaint

3.1 As to a violation of the author's rights under article 14, paragraph 1, of the Covenant, counsel points out that the trial judge directed the jury that, even if it found that the incident happened as the author had stated, a verdict of murder was still open to it. Counsel submits that this was a misdirection because, if the jury found that the events occurred as the author had stated, he would have been entitled to an acquittal, since he lacked the necessary intention. Moreover, in his review of the evidence to the jury, the trial judge suggested that it probably already had made up its mind. Counsel submits that this was improper and amounted to an invitation to the jury to convict the author of murder. Furthermore, it is submitted that the author's defence was severely prejudiced, because the judge permitted an important defence witness to give evidence under the influence of alcohol and/or drugs. Counsel concedes that the trial judge suggested to the jury that the witness could hardly be relied on, but argues that, nevertheless, the judge should not have allowed the evidence, which was unfavourable to the author, to go before the jury and to be used in their deliberations. He submits that, in the circumstances, the judge should have adjourned the trial in order for J. A. to sober up. In this context, counsel refers to the written judgement of the Court of Appeal.

3.2 The irregularities in the admission of evidence, the direction to the jury and comments made by the judge when reviewing the evidence are said to have deprived the author of a fair trial.

3.3 Counsel points out that the alleged murder occurred in August 1979, that V. B.'s first trial and appeal took place at some time thereafter, and that his case did not come before a court again until May 1983, nearly four years after the crime. It was then adjourned because the author had no legal representation. There was a further delay of nearly three years, mainly because the author still had not obtained legal representation. He was eventually tried in April 1986, almost seven years after the events. Counsel concedes that part of the delay appears to be attributable to the author, who did not succeed in retaining counsel privately and failed to apply again for legal aid after his first trial. He submits that nevertheless the retrial took place after an unacceptable length of time, in violation of article 14, paragraph 3 (c).

State party's information and observations

4. The State party concedes that the author has exhausted the domestic remedies available to him. It does not object to the admissibility of the communication.

Issues and proceedings before the Committee

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 While the State party does not object to the admissibility of the communication, it is the Committee's duty to ascertain whether all the admissibility criteria laid down in the Optional Protocol have been met. The Committee has therefore considered the admissibility of the author's claims to be a victim of an unfair trial, (a) because the judge allowed an important defence witness to give evidence while under the influence of alcohol or drugs, evidence that was put before the jury and which it was for the jury to accept or to reject, and (b) because of the alleged inadequate direction to the jury and comments made by the judge. In this context, the Committee recalls its constant jurisprudence that it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before domestic courts. Similarly, it is for the appellate courts and not for the Committee to review the conduct of the trial, or specific instructions to the jury by the judge, unless it can be ascertained that the judge's conduct or the instructions to the jury were clearly arbitrary or amounted to a denial of justice. On the basis of the material placed before it, the Committee does not consider that the judge's instructions or his conduct of the trial suffered from such defects. In particular, the Committee notes that both the Court of Appeal of Trinidad and Tobago and the Judicial Committee of the Privy Council examined these issues. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

5.3 As to the claim of undue prolongation in the judicial proceedings, the Committee notes, on the basis of the information before it, that the delays in the proceedings were essentially attributable to the author. The Committee concludes that in this respect the author has no claim under the Covenant, within the meaning of article 2 of the Optional Protocol.

6. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the author and to his counsel.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ Counsel does not provide information on the author's initial trial, nor on the circumstances of the first appeal.

M. Communication No. 490/1992, A. S. and L. S. v. Australia (decision of 30 March 1993, adopted at the forty-seventh session)

Submitted by: A. S. and L. S. (names deleted)

Alleged victims: The authors

State party: Australia

Date of communication: 26 December 1991 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 1993,

Adopts the following:

Decision on admissibility

1. The authors of the communication dated 26 December 1991 are A. S. and L. S., Australian citizens currently residing in Tuross Head, New South Wales, Australia. They claim to be victims of violations by Australia of articles 2, 16, 17, 26 and "others possibly to be determined by the Human Rights Committee" of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Australia on 25 December 1991.

Facts as submitted

2.1 The authors are shareholders and directors of the Sapphire Investments Ltd. In 1981-1982, they bought a number of land tracts at Merimbula, New South Wales. In 1984, they decided to use the land for the construction of a retirement village, "Valley High Resort Village"; this was an ambitious project requiring substantial borrowing. Initially, Sapphire Investments was funded by Esanda Ltd., but in March 1985, the company approached other financiers for a sizeable loan in order to buy out Esanda and fund the further development of the project. A. S. approached the E. M. Group, a Melbourne-based consulting group acting as mortgage managers, brokers and finance consultants. Another company, B. P. T., a government-licensed lender of public investment funds, acted as the trustee of certain property trusts established and managed by E. M. As the trustee, B. P. T. advanced money to Sapphire Investments against certain collaterals.

2.2 In 1985 and 1986, disputes arose between the authors and B.P.T./E.M. concerning the extent of the financial engagements of the latter. They centred around the issue whether or not B.P.T/E.M. would provide the totality of the funds required to construct, market and manage Valley High, and whether or not E. M. would provide, or assist in opening, further credit lines required by the authors' company in the event that B. P. T. did not do so. The authors contend that such representations were indeed made; the respondents contest it.

2.3 On 15 May 1987, the authors filed a Statement of Claim in the Supreme Court of New South Wales and in the Federal Court of Australia, for breach of contract

and several alleged violations of the Australian Trade Practices Act. On 16 December 1987 the Federal Court ruled in favour of B. P. T. and E. M.

2.4 According to the authors, the case before the Federal Court was "rushed"; they contend that they went into the hearing unprepared and against their express wishes, after the refusal of the judge to reschedule the hearing. In this context, they consider that the judge inappropriately invoked a Bar Association rule which prompted their duly instructed senior counsel, a Q. C., to retire from the case with immediate effect, after "unsubstantiated" allegations that he had previously provided commercial and legal advice to the authors.

2.5 As a result of the adverse decisions, the authors lost their property, including their family home; they consider themselves victims of illegal dispossession and believe that this dispossession was orchestrated to cover up a major financial scandal involving the defendants and to cover "corporate criminals". In A. S.'s opinion, B. P. T. knowingly entered into a number a conflicting positions on the Valley High project, with the intention of fraudulently stripping Sapphire Investments and the A. S. Family Trust of its assets. The defendants allegedly were aided in this endeavour by the E. M. Group.

2.6 The authors further consider that the Government, in order to limit the damage, "colluded" with the judicial authorities to deny the authors justice. Several appeals for a revision of the judgement addressed to the Federal Commissioner for Human Rights, the Prime Minister and the Chief Justice of New South Wales were unsuccessful. The authors admit that it would be possible to challenge the judgement in the High Court; however, the office of the Attorney-General has rejected their request for the assignment of legal aid.

Complaint

3.1 The authors contend that by precipitating the departure of their senior counsel in the proceedings before the Federal Court, the judge discriminated against them and unduly favoured the defendants, who were able to introduce another senior counsel, whereas the authors themselves were left without competent legal advice. The judge's action is said to constitute a violation of articles 2 and 26.

3.2 It is further submitted that the judge unjustly refused to make a ruling under Section 57 of the Legal Aid Act of New South Wales, when rejecting the authors' request for a postponement of the hearing, because the issue of a legal aid assignment had not been settled by the Legal Aid Commission. A. S. and L. S. explain that the judge's refusal forced their children and friends to advance money so as to avoid losing the family home by default. They submit that a decision about the assignment of legal aid was not made until after the beginning of the trial on 28 August 1987, with a new senior counsel appearing for the authors, and add that their new lawyer only had one weekend to study the file.

3.3 The authors claim to be victims of a violation of article 17 of the Covenant, because the judge allegedly allowed the defendants to introduce as evidence confidential documentation on A. S. obtained by "illegal means" from the Federal Department of Social Security. The judge also did not stop the

defendants from introducing allegedly defamatory and unsubstantiated remarks designed to discredit their honour and reputation. By so doing, the defendants allegedly were able to distort the court records, which would otherwise have shown that they were in breach of the Trustee Act of the State of Victoria.

3.4 In respect of their appeal, the authors allege violations of articles 16, 17 and 26, since the Court of Appeal proceeded with the hearing of the appeal in the autumn of 1987, even after being informed that L. S. could not attend the hearing because of illness. The authors further claim that they were denied equality before the law, because they were denied legal aid to argue the seven grounds of appeal. In this context, A. S. indicates that the Court ruled that he, as an Australian of non-anglophone origin, was capable of representing the interests of Sapphire Investments, whereas the defendants were represented by a Queen's Counsel.

3.5 Finally, the authors claim a violation of articles 2 and 26, because the Court of Appeal allegedly did not reach an independent verdict based on the evidence in the appeal documents, thereby denying the authors an effective remedy.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 With regard to the application of the Optional Protocol to Australia, the Committee recalls that it entered into force on 25 December 1991. It observes that the Optional Protocol cannot be applied retroactively and concludes that the Committee is precluded ratione temporis from examining events that occurred in 1985-1987, unless it is demonstrated that these acts or omissions continued or had effects after the entry into force of the Optional Protocol, constituting in themselves violations of the Covenant. No evidence has been adduced to show that the proceedings at issue had such effects.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be transmitted to the authors and, for information, to the State party.

[Done in English, French and Spanish, the English text being the original version.]

N. Communication No. 496/1992, T. P. v. Hungary (decision of 30 March 1993, adopted at the forty-seventh session)

Submitted by: T. P. (name deleted)

Alleged victim: The author

State party: Hungary

Date of communication: 19 September 1990 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication (dated 19 September 1990) is T. P., a Hungarian citizen, born on 11 August 1924, currently residing in Budapest, Hungary. He claims to be a victim of a violation by Hungary of articles 6, 7, 9, 12, 14, 17, 18, 19 and 25 of the Covenant. Hungary is a party to the Optional Protocol to the International Covenant on Civil and Political Rights since 7 December 1988.

Facts as submitted

2.1 The author states that he served as a soldier towards the end of the Second World War. After the war he was deported to the Soviet Union to work in labour camps. Upon his return to Hungary, he inherited half of his late mother's real estate and was consequently considered to be a "kulak". Although he had obtained a doctor juris degree, he was not allowed to exercise his profession. His real estate was nationalized. Although the author is entitled to compensation under a recently enacted compensation law, he claims that the compensation under this law is wholly insufficient.

2.2 The author states that he was wounded during the political uprising in 1956. In 1960 he was allegedly kidnapped by the secret police; in 1961 he was sentenced to 15 years' imprisonment. In 1966 he started a hunger strike to protest against his continued detention and the allegedly inhuman prison conditions. After six weeks he was transferred to the prison's mental hospital, and subjected to "electro- and insulin-shocks". The author submits that he was held there until 1971, all the time being kept in isolation. In April 1971 he was transferred to a civilian mental hospital; he was discharged in November 1971. He was again detained in a psychiatric hospital for short periods of time in 1981 and 1982.

2.3 The author contends that the secret police prevented him from finding employment. He claims that, if he had been employed for a period longer than six months, his legal status as a mentally ill person would have been reversed. He submits that, because of the involvement of the secret police, he was able to

obtain only freelance work as a translator. He alleges that this discrimination against him still continues, and mentions in this connection the refusal of the Ministry of International Economic Relations, on 12 November 1991, to hire him as a lawyer, although he fulfilled all the requirements.

2.4 The author alleges that he was kidnapped eight times by secret police officers. Each time he complained to the Chief Public Prosecutor, but only once, in June 1988, were disciplinary measures taken against the officers involved.

2.5 The author further states that on 24 September 1986 his passport was withdrawn and he was henceforth prevented from leaving the country, on the grounds that he had not behaved as a good Hungarian citizen during a visit to Western Europe in 1986. The author's appeals against this decision were dismissed, but in September 1990 the decision was reversed, following the author's complaint to the Minister of Internal Affairs.

2.6 The author claims that on several occasions (he specifically mentions events on 15 March 1990 and 1 June 1991) speeches and addresses delivered by him were not transmitted on television, although speeches delivered by others on the same occasions were. He further alleges that publication of his articles and speeches in newspapers has been prevented by the Hungarian authorities. In connection with an address, delivered by the author to an international peace conference during November 1988, the author started a libel suit against the editor of a newspaper that had reported on the event, however, without success.

Complaint

3.1 The author seeks a rehabilitation of his "human dignity". He contends that, on several occasions, the authorities have referred to him as "mentally ill".

3.2 The author claims to be a victim of a violation of the following articles of the Covenant:

(a) Article 6, because, although he survived "Leninism's attempt to liquidate the upper social classes", he has been deprived of all his properties and prevented from exercising his profession;

(b) Article 7, because he was held in solitary confinement for more than eight years, and was subjected to electro-shock and other inhuman and degrading treatment from 1966 to 1971;

(c) Article 9, because he was arbitrarily deprived of his liberty during many years;

(d) Article 12, because he was not allowed to leave the country from September 1986 to September 1990;

(e) Article 14, because he was not given the opportunity to prove in a fair trial that the measures which the authorities had taken against him were abusive;

(f) Article 17, because the secret services interfered with his private life on many occasions; in this connection he refers to registered letters that never arrived;

(g) Articles 18 and 19, because his writings are still not being published;

(h) Article 25, because active participation in political life is only allowed to those who are prepared to make compromises with the authorities.

3.3 The author claims that said violations have continuing effects that in themselves constitute violations of the Covenant, in that the authorities refuse to rehabilitate him and continue to suppress his freedom of opinion.

3.4 With regard to exhaustion of domestic remedies, the author states that he has been demanding a fair hearing since 1964. In 1981 the City Court of Budapest decided that the author's treatment in the Psychiatric Department was legal and permissible. In 1982 the author complained to the Chief Public Prosecutor, demanding the abolition of KGB methods. He also complained to the International Academy of Legal and Social Medicine, during a congress held in Budapest in September 1985, to no avail.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee recalls that the Optional Protocol entered into force for Hungary on 7 December 1988. It observes that the Optional Protocol cannot be applied retroactively and concludes that the Committee is precluded ratione temporis from examining events that occurred prior to 7 December 1988, unless the alleged violations continue after the entry into force of the Optional Protocol for the country concerned or have effects that constitute in themselves a violation of the Covenant. Accordingly, the Committee finds that it is precluded from examining the author's allegations regarding violations of his rights under articles 6, 7, 9, 14 and 17 of the Covenant.

4.3 As to the author's claim that he is a victim of a violation by the State party of article 12 of the Covenant, the Committee observes that, in September 1990, the State party reversed its decision to withdraw the author's passport, thereby remedying the situation. In this respect, therefore, the author has no claim under article 2 of the Optional Protocol.

4.4 With regard to the author's remaining allegations, the Committee considers that they have not been substantiated for purposes of admissibility and are therefore inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Done in English, French and Spanish, the English text being the original version.]

O. Communication No. 499/1992, K. L. B.-W. v. Australia (decision of 30 March 1993, adopted at the forty-seventh session)

Submitted by: K. L. B.-W. (name deleted)

Alleged victim: The author

State party: Australia

Date of communication: 15 November 1991 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 March 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication (dated 15 November 1991) is Mrs. K. L. B.-W., an Australian citizen, born on 13 February 1942, currently residing in London, England. She claims to be a victim of a violation by Australia of articles 6, paragraph 1; 7; 9, paragraphs 1, 4, and 5; 10, paragraph 1; 16; 17, paragraphs 1 and 2; and 26; juncto article 2, paragraphs 2 and 3 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Australia on 25 December 1991.

Facts as submitted

2.1 The author states that she was pregnant in 1970 of her second child and experiencing heart problems, perhaps linked to her mental state, as she was going through a period of marital stress. She was referred to Dr. H. B., a psychiatrist working at Chelmsford Private Hospital in New South Wales, Australia. The author submits that her physical complaints were never taken seriously, although later examination attributed the symptoms to a form of diabetes.

2.2 In April 1970, the author collapsed after having taken her son to school. She states that she awoke seven hours later in the psychiatrist's office, attached to an ECG machine. That night she was admitted to Chelmsford Private Hospital. She signed no admission papers, and was allegedly injected with pentothal, which made her lose consciousness.

2.3 The author contends that she was subjected to a regime of electroconvulsive therapy, being maintained in deep sleep therapy without food, on drug dosages that exceeded forensic limits and without being given muscle relaxants. She states that she was held against her will, sexually abused by the psychiatrist and assaulted by the nurses. Her physical problems were never attended to. After three weeks the author was released, after her mother had threatened the hospital with legal action.

2.4 The author's second son was born on 25 July 1970. The author states that the health of her son has always been and still is precarious. After a thorough examination, when he was 13 years old, doctors allegedly found inter alia that his nervous system and his muscle tissue had suffered as a result of the electric currents passing through them at the vital stage in their development. According to the author her son would need years of physiotherapy to get even a reasonable development of the muscle tissue.

2.5 The author further provides information which shows that a governmental investigation into abuses in Chelmsford Private Hospital was carried out in 1989. The results of the investigation show inter alia that 48 deaths had occurred, in which a link with deep sleep therapy could be proven; that Dr. H. B. was negligent and psychopathic in his treatment of patients; that patients were not given proper care and were undernourished; and that the Department of Health had not been careful enough in its supervision of the Hospital. The Royal Commission, which had carried out the investigation, recommended the criminal prosecution of the doctors involved.

2.6 The author concedes that she has not exhausted domestic remedies, but claims that the application of domestic remedies would be unreasonably prolonged, within the meaning of articles 5, paragraph 2, of the Optional Protocol. She states that Dr. H. B. committed suicide in 1985; none of the other doctors have been prosecuted; they are still in practice. She submits that court action has been initiated by some of the victims of malpractice at Chelmsford, to no avail; these cases have been before the Court for over 10 years. She estimates the litigation costs at $250,000 per suit and submits that no victim can afford this.

2.7 The author claims that the medical profession is a powerful political force in Australia, preventing the victims from obtaining an effective remedy, either through the courts or through an ex gratia payment by the government. She further submits that, because of the time lapse, much of the evidence is missing and witnesses have died or become senile. She points out that her case is now 21 years old, and that the length of time that has transpired has deeply and intrinsically restricted any effective opportunity for reasonable remedy.

2.8 The author states that she has applied to the Victims Compensation Tribunal, which can assess compensation for victims of violent crimes. However, none of the doctors have been convicted as yet, and the author does not expect to obtain effective compensation through the Tribunal.

2.9 She claims that the New South Wales government should give ex gratia payments to the victims, which, however, it refuses to do. She concedes that the Legislative Assembly, on 21 December 1991, agreed to a motion, providing for $10 million to compensate 200 out of the alleged 1,700 victims of the malpractices at Chelmsford. The author claims, however, that this does not constitute an effective remedy, as the amount is not sufficient and as it is not clear who would qualify for the compensation.

Complaint

3. The author alleges that the failure of the New South Wales government to provide an adequate remedy for the maltreatment she suffered constitutes an ongoing violation by Australia of articles 6, paragraph 1; 7; 9, paragraphs 1,

4, and 5; 10, paragraph 1; 16; 17, paragraphs 1 and 2; and 26; juncto article 2, paragraphs 2 and 3 of the International Covenant on Civil and Political Rights.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee recalls that the Optional Protocol entered into force for Australia on 25 December 1991. It observes that the Optional Protocol cannot be applied retroactively and that the Committee is therefore precluded ratione temporis from examining events that occurred prior to 25 December 1991, unless they continue after the entry into force of the Optional Protocol or have effects that in themselves constitute a violation of the Covenant. Accordingly, the Committee finds that it is precluded ratione temporis from examining the author's allegations.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Done in English, French and Spanish, the English text being the original version.]

P. Communication No. 501/1992, J. H. W. v. the Netherlands (decision of 16 July 1993, adopted at the forty-eighth session)

Submitted by: J. H. W. (name deleted)

Alleged victim: The author

State party: The Netherlands

Date of communication: 5 May 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 July 1993,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 5 May 1992, is J. H. W., a Dutch citizen, born on 3 October 1919, presently residing in Wassenaar, the Netherlands. He claims to be a victim of a violation by the Netherlands of article 26 juncto article 2, paragraph 3, of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted

2.1 The author states that under the General Child Benefit Act, contributions are levied on the same basis as wage and income tax. These contributions are used to fund the benefits payable under the Act to assist parents in the maintenance of their children. Contributions have to be paid up to the age of 65, regardless whether one will ever apply for a benefit under the Act or not. However, an exemption was made, by Royal Decree of 27 February 1980, pursuant to article 25, paragraph 2, of the Act, for unmarried childless women over the age of 45. The exemption was based on the expectation that these women would remain childless. No similar exemption was made for unmarried childless men over the age of 45. The exemption for women was subsequently withdrawn in 1989.

2.2 On 30 August 1986, the author received notice of the assessment concerning his contributions under several social security acts, including the Child Benefit Act, covering the period from 1 January 1984 to 3 October 1984. He objected to the assessment, whereupon the tax inspector decided to reduce his assessed contributions. An amount (10,160 guilders in total) remained to be paid, however. The author appealed the tax inspector's decision to the tax chamber of the Court of Appeal (Belastingkamer van het Gerechtshof) at The Hague, invoking, inter alia, article 26 of the Covenant. By judgement of 1 March 1990, the Court dismissed the appeal. The author subsequently appealed to the Supreme Court (Hoge Raad), which dismissed his appeal on 11 December 1991. The Supreme Court considered that the distinction made in the Act was reasonable, taking into account the physical differences between men and women.

Complaint

3.1 The author claims that he is a victim of discrimination based on sex, since he has been denied an exemption which he would have enjoyed if he had been a woman. He argues that there is no objective, reasonable and proportionate justification for the distinction made in the Child Benefit Act between men and women. He refers in this connection to a statement of the Dutch Government in 1988 to the effect that an exemption for women only was no longer acceptable, following developments in present-day society. The author argues that this was not acceptable in 1984 either. He submits in this context that the Covenant should be interpreted in the light of present-day developments, and that views prevalent at a time when the legislation was introduced cannot be decisive when applying the Covenant to his case. In this connection the author refers to the views of the Committee in communication No. 172/1984 (Broeks v. the Netherlands) and to relevant jurisprudence of the Dutch courts.

3.2 Moreover, the author argues that it is not correct to expect that women aged over 45 will not have children. In this connection, he refers to the regulation in the Child Benefit Act according to which an applicant can receive benefits for foster children. He further submits that, even if the distinction between men and women could be based on objective data, showing that women over 45 are less likely to beget children than men, this would still not justify the distinction. According to the author, the small difference in possibility did not justify such an absolute distinction. In this connection, the author contends that the statistical frequency of a man over the age of 45 to father a child is not more than few per thousand. The author therefore concludes that the necessary proportionality between the distinction and the aim of the exemption is lacking.

State party's observations

4. By submission dated 4 September 1992, the State party concedes that the author has exhausted the domestic remedies available to him. It does not raise any objections to the admissibility of the communication.

Issues and proceedings before the Committee

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that the State party does not object to the admissibility of the communication. Nevertheless, it is the Committee's duty to ascertain whether all the admissibility criteria laid down in the Optional Protocol have been met. In this context, the Committee notes that the State party, in 1989, adopted measures to abolish the exemption at issue in the present communication. The Committee considers, taking into account that social security legislation and its application usually lag behind socio-economic developments in society, and that the purpose of the abrogated exemption was at its time not generally considered discriminatory, that the issue which the author raises in his communication is moot and that he has no claim under article 2 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party, to the author and to his counsel.

[Done in English, French and Spanish, the English text being the original version.]